TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~202~~ 41.

CATHERINE SCHLEMMER, PLAINTIFF IN ERROR,

vs.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED JUNE 7, 1905.

(19,794.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 292.

CATHERINE SCHLEMMER, PLAINTIFF IN ERROR,

vs.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 31, 1906.

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1 In the Supreme Court of Pennsylvania in and for the Western District.

COMMONWEALTH OF PENNSYLVANIA, *County of Allegheny, sct:*

Among the records and proceedings of the Supreme Court of Pennsylvania, in and for the Western District, the following may be found as matter of file and of record at No. — Oct. Term, 18—, to wit:

2 Among the records and proceedings enrolled in the Court of Common Pleas in and for the County of Jefferson in the Commonwealth of Pennsylvania, to No. 194 April Term, 1901, is contained the following,—

Copy of Continuance Docket Entry.

194.

CATHERINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

Summons in Trespass. Issued March 20, 1901. Ret. to next Term March 26, 1901, Served the within Summons on the within named Defendant Company by giving to L. C. McGaw, Agent of the within named Company at Punxsutawney, Jefferson County, Pennsylvania, a true and attested copy and by making known to him the contents thereof. May 17, 1901, Plaintiff's statement filed. May 17, 1901, Rule on the Defendant to plead within 15 days or judgment *sec. reg.* issued. May 18, 1901, served the within rule personally on the within named Defendant Company by giving to C. Z. Gordon, Attorney of said Company a true and attested

3 copy of the same at his office in the borough of Brookville, Jefferson County, Pennsylvania, and by making known to him the contents thereof. May 18, 1901, Defendant's Plea of "Not Guilty" filed. T. L. Nov. Term, 1901, Octo. 25, 1901, Compulsory Rule to choose Arbitrators on the part of the Defendant on Nov. 20, 1901, at 10 o'clock, A. M. issued. November 20, 1901, Samuel States, Chas. S. Irvin and H. W. Mundorff chosen Arbitrators who are to meet at the Court House December 10, 1901, at 9 o'clock A. M. Same day Rule to arbitrators issued. Decr. 9, 1901, Agreement of counsel to strike off Rule of Reference filed. Nov. 22, 1901, served Rule to Arbitrate on Defendant by giving a true and attested copy of same to her Att'y Jeff G. Wingert, Esq., &c., Same day served personally on H. W. Mundorff, Nov. 23, 1901, served same personally on Samuel States and Chas. S. Irvin. T. L. April Term, 1902. April 29, 1902, Jury called and sworn. Same day motion for Compulsory non-suit granted by the Court, with leave to plaintiff to make motion to take same off within four days, By

the Court. May 2, 1902, Motion to take off compulsory non-suit filed. July 22, 1902, Opinion of Court filed and motion to take off the compulsory non-suit heretofore granted is refused. Frank F. Thomas, President Judge 30th Jud. Dist. Specially presiding. Jan'y 19, 1903, Certiorari from Supreme Court filed and notice of filing served on C. Z. Gordon, Att'y for Defendant. Jan'y 24, 1903, Notes of testimony filed. Sept. 15, 1903, Exception and Bill sealed on motion to set aside non-suit by Hon. Frank J. Thomas, P. J. 30 Judicial Dist. Specially presiding filed.

4 In the Court of Common Pleas of Jefferson County, April Term 1901.

No. —.

CATHERINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

Cyrus H. Blood, Esq., Prothonotary of said Court.

SIR: Issue summons in an action of trespass, returnable *sec. reg.*

JEFF G. WINGERT,
Attorney for Plaintiff.

March 20th, 1901.

No. 194 April Term, 1901. Catherine Schlemmer *vs.* The Buffalo, Rochester and Pittsburgh Railway Company. Præcipe for Summons in Trespass. Filed March 20, 1901. Wingert.

5 STATE OF PENNSYLVANIA, *Jefferson County, ss:*

The Commonwealth of Pennsylvania to the Sheriff of said County, Greeting:

We command you that you summon The Buffalo, Rochester and Pittsburgh Railway Company, so that it be and appear before our court of Common Pleas to be held at Brookville in and for said county, on the Second Monday of April next, to answer Catharine Schlemmer in a plea of Trespass Damages claimed and have you then and there this writ.

Witness the Hon. John W. Reed, President Judge of our said Court at Brookville, the 20th day of March in the year of our Lord, 1901.

CYRUS H. BLOOD,
Prothonotary.

6 No. 194 April Term, 1901. Catharine Schlemmer *vs.* The Buffalo Rochester and Pittsburgh Railway Company. Summons. In Trespass. Jeff. G. Wingert Attorney.

March 21, 1901, Served the within summons on the within named defendant company by giving to L. C. McGaw, Agent of the within named company at Punxsutawney Jefferson County Pennsylvania by giving him a true and attested copy and by making known to him the contents thereof.

So ans.

J. M. CHESNUTT, *Sh'ff.*

Sh'ff costs Chesnutt $5.53.

Sworn to and subscribed before me this 6 day of April 1901.

CYRUS H. BLOOD, *Pro.*

7 In the Court of Common Pleas of Jefferson County. No. — of April Term, 1901.

CATHERINE SCHLEMMER

v.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY (a Corporation).

Trespass.

Plaintiff's Statement.

JEFFERSON COUNTY, *ss:*

The plaintiff, Catharine Schlemmer, claims of the defendant, The Buffalo Rochester and Pittsburgh Railway Company, a corporation, the sum of Ten Thousand Dollars, which is justly due and payable to the plaintiff by the defendant upon the cause of action whereof the following is a statement:

The defendant was summoned to answer plaintiff of a plea of trespass and thereupon plaintiff by her attorneys J. G. Wingert and A. J. Truitt, complains of defendant, a corporation duly organized and doing business within the State of Pennsylvania—in the Counties of Jefferson and Clearfield among others—and having certain of its works, tracks, cars and other equipment in said Counties of Clearfield and Jefferson and carrying on certain of its purposes and operations in said Counties.

8 That Adam M. Schlemmer, husband of plaintiff, had been for sometime theretofore and was on the 5th day of August A. D. 1900 in the employ of defendant company, on said particular date acting in the capacity of flagman on one of defendant's freight trains. And while thus employed her said husband on said day, to wit, August 5th A. D. 1900, was killed by reason of defendant's negligence as will hereinafter appear and this action has been instituted to recover the damages therefor. Said damages for said injury resulting in the death of plaintiff's husband belonging to plaintiff as widow and to her two children Edwin E. Schlemmer, aged 4 years, and Charles C. Schlemmer, aged 3 years, they being all the children left by decedent thus entitled along with plaintiff.

Decedent was a careful, competent, willing and faithful employee of defendant company. And while engaged in the line of his duties and of his employment on said date, viz. August 5, 1900, in what is known as the Dubois yards of defendant company in the County of Clearfield aforesaid he lost his life by reason of defendant's carelessness as shown by the following facts and circumstances, viz.:—

Defendant had received and was transporting over its railroad and under its direction what is known as a shovel or shovel car or steam shovel car which is used in construction work. The
9 coupling of this shovel car was exceedingly complicated and dangerous. Decedent was not warned by plaintiff in any way or manner of this unusual and dangerous arrangement or appliance and darkness having come on went under this shovel car with his lantern burning brightly to make the coupling; the drawbar of the coupling of the shovel car was unusually large and heavy weighing some 80 pounds; decedent used good judgment, did his best, made use of his former knowledge of all ordinary contrivances of this kind but by reason of defendant's negligence and carelessness in not having instructed him in the manipulation of this dangerous coupling and in not having warned him in regard to the same the decedent failed in making the coupling and his head was caught between the steam shovel car and the end sill of the caboose to which he was trying to couple the shovel car and thus he was killed, dying in about one hour thereafter his head having been crushed as aforesaid. By reason of the darkness decedent could not observe many things which he otherwise might have had it been daylight. Said dangerous shovel car had no deadwoods it projected over the drawhead several feet and the drawhead itself was what is known as an old fashioned one not being a patent one and safe in any respect or of the latest and best appliance of its kind. Said coupler was not a legal coupler or coupling as required by existing laws on date — decedent's death viz. on August 5, A. D. 1900. Defendant was
10 transporting said shovel car from Limestone in the State of New York through the State of Pennsylvania.

Decedent at time of his decease was of the age of 31 years, in good health, able and strong and willing to work, received good wages.

Therefore plaintiff on account of defendant's negligence and carelessness as aforesaid in causing the death of her said husband has brought this action against defendant to recover said sum of Ten Thousand dollars being the pecuniary loss sustained by her and her said children by reason thereof.

JEFF G. WINGERT,
A. J. TRUITT,
Attorneys for Plaintiff.

No. — April Term, 1901. Com. Pleas Jeff. Co. Catherine Schlemmer *v.* The B. R. & P. Ry. Co. Plff's Statement. Filed May 17, 1901. J. G. Wingert, A. J. Truitt Att'ys.

11 In the Court of Common Pleas of Jefferson County. No. —. April Term, 1901.

CATHERINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

To Cyrus H. Blood, Esq., Prothonotary of said Court.

SIR: Issue rule on defendant to plead in 15 days, or judgment *sec. reg.*

JEFF G. WINGERT,
A. J. TRUITT,
Attorneys for Plaintiff.

May 16th, 1901.

No. 194 April Term, 1901. Catherine Schlemmer *vs.* The Buffalo, Rochester and Pittsburgh Railway Company. Præcipe for rule to plead. Filed May 17, 1901. Wingert, Truitt.

12 In the Court of Common Pleas of Jefferson County, April Term, A. D. 1901. No. 194.

CATHARINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

And now, to wit: May 17th 1901 at the instance of Jeff. G. Wingert and A. J. Truitt, Esqrs., Attorneys for the Plaintiff Rule on the defendant above-named to plead within 15 days or judgment will be entered *sec. reg.*

[SEAL.]

Certified from the Record.

CYRUS H. BLOOD,
Prothonotary.

Brookville, Pa., May 17th, 1901.

13 No. 194 April Term, 1901. Catharine Schlemmer *vs.* The Buffalo, Rochester and Pittsburgh Railway Company. Rule on Defendant to plead. Truitt & Wingert.

May 18, 1901, Served the within Rule personally on the within named Defendant Co. by giving to C. Z. Gordon Attorney of said Company a true & attested copy of the same at his office in the Borough of Brookville, Jefferson County Pennsylvania & by making known to him the contents thereof.

So. ans.

J. M. CHESNUTT, *Sh'ff.*

Sh'ff costs Chesnutt $2.24.

Sworn to and subscribed before me this 18" day of May 1901.

CYRUS H. BLOOD, *Pro'y.*

14 *Defendant's Plea.*

In the Court of Common Pleas of Jefferson County, of April Term, 1901.

No. 194.

CATHARINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY.

May 18th, 1901, the Defendant, by C. H. M'Cauley and C. Z. Gordon, its attorneys, pleads Not Guilty.

C. H. M'CAULEY,
C. Z. GORDON,
Att'ys for Defendant.

No. 194 April Term, 1901. Catharine Schlemmer *vs.* The Buffalo, Rochester & Pittsburgh Railway Co. Defendant's Plea. Filed May 18, 1901. M'Cauley, Gordon, Def't's Att'ys.

15 *Compulsory Rule of Reference.*

In the Court of Common Pleas of Jefferson County. No 194, April Term, 1901.

CATHARINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY.

And now, to wit, on this 25th day of October, A. D. 1901, the defendant, by C. Z. Gordon, its attorney, comes into the office of the Prothonotary of the Court of Common Pleas of Jefferson County, Pa., and enters a rule of reference in the above cause, and states it to be the determination of the said defendant company to have arbitrators chosen on the 20th day of November, A. D. 1901, at ten o'clock in the forenoon of said day at the office of the Prothonotary of said Court, in the Borough of Brookville, in the County aforesaid, for the trial of all matters in variance between the parties in the above stated action, agreeably to the Act of Assembly of the Commonwealth of Pennsylvania, entitled "An Act Relating to Reference and Arbitration," passed the 16th day of June, A. D. 1836, and its supplements.

C. Z. GORDON,
Attorney for the Defendant.

16 No. 194 of April Term, 1901. Catharine Schlemmer *vs.* The Buffalo, Rochester & Pittsburgh Railway Co. Compulsory Rule of Reference. Filed Octo. 25, 1901.

17 *Rule to Choose.*

JEFFERSON COUNTY, *ss:*

In the Common Pleas of Jefferson County. No. 194, of April Term, 1901.

CATHARINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY.

And now, to wit, the 25" day of October 1901, the defendant files its determination to have all matters at variance between the parties submitted to arbitrators to be chosen at the Prothonotary's Office, in Brookville, on the 20" day of November next, at 10 o'clock A. M. of said day.

Extract from the record,

CYRUS H. BLOOD, *Prothonotary.*

And now, November 20, 1901, Plaintiff by Jeff G. Wingert, Esq., and C. C. Benscoter for Defendant met, and the Prothonotary fixed the number of Arbitrators at three and made choice of Samuel States, Chas. D. Irvin and H. W. Mundorff who are to meet at the
18 Court house on the 10" day of December 1901, at 9 o'clock A. M.

JEFF G. WINGERT,
Att'y for Pl't'ff,
C. Z. GORDON,
Per C. C. BENSCOTER,
Att'y for Def't.

No. 194 April Term, 1901. Catharine Schlemmer *versus* The Buffalo, Rochester and Pittsburgh Railway Co. Rule to Choose Arbitrators. Served on me Oct. 28" 1901. A. J. Truitt Att'y for Deff. Gordon.

19 *Rule to Arbitrate.*

JEFFERSON COUNTY, *ss:*

[SEAL.]

In the Court of Common Pleas of Jefferson County. No. 194, of April Term, 1901.

CATHARINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY CO.

And now, to wit, Plaintiff and Defendant by Attorneys having met at the Prothonotary's Office, made choice of Samuel States,

Chas. S. Irvin and H. W. Mundorff to whom all matters at variance between the parties in this case are to be submitted, who are to meet at the Court House in the Borough of Brookville, on the 10th day of December, 1901, next at Nine (9) o'clock, A. M.

Extract from the record.

CYRUS H. BLOOD, *Prothonotary.*

20 No. 194 April Term, 1901. Catharine Schlemmer *vs.* The Buffalo, Rochester and Pittsburgh Railway Company. Rule to Arbitrators.

Sworn to and subscribed before me this 31 day of December, 1901.

CYRUS H. BLOOD.

Nov. 22, 1901, Served the within Rule on the within named plaintiff Catharine Schlemmer by leaving a true and attested copy of same with her Atty. J. J. Wingert & by making known to said Atty the contents thereof. Also same day served same personally on the within named H. W. Mundorff by giving to him a true & attested copy and by making known to him the contents thereof.

Nov. 23 1901, Served same on Samuel States & Chas S. Irvin by leaving with an adult member of their families a true and attested copy of same & by making known to said adults the contents thereof.

So. ans.

J. M. CHESNUTT, *Sh'ff.*

Sh'ff costs Chesnutt $13.20

21 In the Court of Common Pleas of Jefferson County, Pa.
No. 194, of April Term, 1901.

CATHARINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

December 9th, 1901, it is hereby agreed between plaintiff and defendant in above stated case, by their respective attorneys, that the rule of reference heretofore taken out be stricken off without prejudice to the rights of either party.

A. J. TRUITT,
Attorney for the Plaintiff.
C. Z. GORDON,
Attorney for the Defendant.

No. 194 of April Term, 1901. Catharine Schlemmer *vs.* The Buffalo, Rochester and Pittsburgh Railway Co. Agreement to strike off Rule of Reference. Filed Dec. 9, 1901.

22 In Comm. Pleas, Jeff. Co. No. 194, April Term, 1901.

CATH. SCHLEMMER
v.
B., R. & P. RY. CO.

Now, April 29, 1902, Defts. by its Attys moves for a non suit in the above case for the following reasons.

1. That there is no proof of any negligence on part of defendant in this cause.

2. That the evidence upon behalf of plaintiff proves conclusively that the accident happened because the deceased failed to keep his head at least as low as the floor of the steam shovel—that this omission was the fault of the deceased exclusively—and that deceased was guilty of contributory negligence and there can be no recovery in this case.

3. That under all the evidence in this case their verdict must be for the defendant.

C. Z. GORDON,
C. H. M'CAULEY,
Att'ys for Deft.

23 No. 194, April Term, 1901.

April 29, 1902, Notice for Compulsory Non-suit granted with leave to the plaintiff to make a motion to take same off within four days.

BY THE COURT.

24 In the Court of Common Pleas of Jefferson County. No. 194, April Term, 1901.

CATHERINE SCHLEMMER
v.
THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

And now, May 2nd, 1902, the plaintiff, by her attorneys, A. J. Truitt and Jeff G. Wingert, moves the Court to take off the compulsory non-suit entered in above case for the following reasons, viz:

First. The Court erred in directing the Jury to render a verdict for the defendant.

Second. The Court erred in ruling as a matter of law that the plaintiff was not entitled to recover in this case.

Third. That the evidence showed that the decedent, Adam M. Schlemmer, was not negligent, and used all the care demanded by the circumstances.

Fourth. That under the United States Statutes specially pleaded in this case, that the decedent was not deemed to have assumed the risk owing to the fact that the car was not equipped with an automatic coupler.

25 Fifth. The evidence showed that the defendant company violated the law, and was, therefore, guilty of negligence and caused decedent's death.

Sixth. That the evidence showed that the coupling which the decedent attempted to make was complicated, difficult and dangerous, and defendant company had neglected to instruct decedent as well as inform him of the nature thereof.

Seventh. That the evidence disclosed that the car coupling in this case was out of date, more dangerous than the old link and pin coupling, and not a reasonably safe appliance.

Eighth. That the evidence showed that the decedent attempted to make coupling with lantern lighted, and that it was a question for the Jury to determine whether decedent used ordinary care.

Ninth. That the evidence of the experts showed that the shovel car in this case was the first car of this kind handled by them in many years of experience, that it had an unusual coupling, that it had no deadheads or bumpers thereon, and that the defendant company accepting such a car thus equipped was guilty of negligence *per se.*

A. J. TRUITT.
JEFF G. WINGERT.

26 No. 194 April Term, 1901. C. P. Jeff. Co. Catharine Schlemmer *v.* The Buffalo, Rochester and Pittsburgh Railway Company. Motion to take off Compulsory non-suit. Filed May 2, 1902.

27 In the Court of Common Pleas of Jefferson County. No. 194, April Term, 1901.

CATHERINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY.

Sur motion to take off compulsory non-suit.

Thomas, P. J. Specially presiding.

Opinion.

It is urged that we erred in granting this non-suit for two principal reasons)—That the evidence on the part of the plaintiff tended to show negligence on the part of defendant, free from any negligence on the part of decedent that contributed to the accident that caused his death, and that said evidence showed that defendant company had violated the United States statute, specially pleaded, with reference to the equipment of the car that caused decedent's death with the proper safety appliances by such statute provided for.

28 Ordinarily, a master is required to provide for his servants or employees, not perfect, or even the best of appliances, but such as are reasonably suitable for the purpose of carrying on

the business about which they are engaged. When this has been done, the employee assumes the risk of injury from such ordinary dangers as necessarily and usually accompany his employment and from any unusual dangers incident to said employment of which he had notice and voluntarily exposed himself thereto.

The evidence showed that plaintiff's decedent, who was shown to have been a competent man in the position of brakeman, which he occupied and in which he had had considerable experience, attempted to make a coupling, which was shown not to have been complicated or difficult to understand, and of which said decedent undoubtedly had a thorough knowledge and comprehension, between one of the defendant's cars and a steam shovel or construction car, which was being conveyed by defendant company, for some private parties, from a point in the State of New York to one in this Commonwealth; that plaintiff's decedent, who could evidently see and understand the said coupling as attached to the steam shovel, had his attention called thereto, and was directed as to his position in making use
29 thereof twice by the conductor of his own train and of the switching engine crew, and within a very few minutes of the accident; and that in making said coupling, decedent, contrary to the instruction, immediately prior thereto given, raised his head too much, and because of that, as well as because of the irregularity or unevenness of the heights of the respective car and steam shovel, and the absence of bumpers or deadwoods that would properly operate for the purpose of preventing that which actually happened, the decedent's head was crushed, resulting in his almost immediate death.

The plaintiff's statement declares that the coupling of the steam shovel was exceedingly complicated and dangerous, and that decedent was not warned of said unusual and dangerous applicance, and by reason thereof the accident happened which resulted in the death of decedent.

Plaintiff's testimony not only fails to sustain these charges but quite negatives them.

That the coupling arrangement was not complicated was made very apparent by the testimony; that decedent was warned as to the danger and directed as to the manner of operation was conclusively proven; and that he attempted the act of making the coupling with a full knowledge of the danger seems to be beyond contro-
30 versy. A citation of authorities is not necessary to show that the defendant company is not to be held for negligence because of the fact that it has undertaken to convey a steam shovel, equipped with a means of coupling which is not of the latest device, or even if it were dangerous, where the brakeman understood or was made aware of the difficulty or danger to be *gaurded* against; nor if the injury was caused by the fault of the employe in taking unnecessary risks, or in failing to heed warnings or instructions, especially when given by his superiors whose duty it is to do so; nor by voluntarily placing himself unnecessarily in a dangerous position whereby he is injured.

It is alleged that these rules are not applicable to the case at bar, or rather that the case at bar is removed therefrom by the act of Con-

gress, which went into effect a few days prior to this accident, and which prohibits all carriers from hauling or permitting to be hauled on their lines any car used in interstate traffic which is not equipped with the automatic coupler, the eighth section of which provides, "that any employee of such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk
31 thereby occasioned, although continuing in the employment of such common carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

It is urged that this steam shovel was not a "car used in interstate traffic," and therefore, the act of Congress is not applicable thereto.

Our attention has been called to the decision of the United States Circuit Court for the Southern District of Iowa, in the case of White *v.* Chicago Great Western Railway Company and referred to in the Fifteenth Annual Report of the Interstate Commerce Committee, p. 67, where in construing a statute quite similar, it was held that a locomotive tender was not a car within the meaning of the act.

In our opinion, this would be putting a stricter construction on the act than was intended by the law-making power, and possibly more strict than is literally warranted. But we are of opinion that this shovel car was not a car used in interstate commerce or any other kind of traffic. Such was not its purpose nor the use to which it was being put.

But even were the steam shovel, as shown to have been operated or transferred and equipped, construed to come under the provisions of said act, we are of opinion that plaintiff is not en-
32 titled to recover, for the reason that her own testimony adduced at the trial showed the decedent to be guilty of negligence that contributed to his death.

True, under said act he was not considered to have assumed the risks of his employment, but by this is certainly meant no more than such risks as he was exposed to thereby, and resulted in injury free from his own negligent act. It would hardly be argued that defendant would be liable, under such circumstances, were the employé to voluntarily inflict an injury upon himself by means of the use of the improperly equipped car. And yet it is but a step from contributory negligence to such an act.

We think the true position to be, that the employé is placed in the position that he would be, in case he were furnished with a defective appliance, which fact is known to his employer but not, either actually or constructively, to the employé. In such a case the employé has not assumed the said risk incident to his employment, and yet we trust it would not be seriously contended that such an employé might recover for an injury to which his own negligence had contributed.

It has been held that contributory negligence will bar a recovery for an injury inflicted by defendant's negligence which is the
33 result of a failure to comply with statutory requirements.

McRickard *v.* Flint, 114 N. Y. p. 222;

Grand *v.* Mich. and C. R. Co., 3 Mich. p. 564; and

Nugent *v.* Vanderveer, 38 Hun. p. 487, (same case on re-argument, 39 Hun. 322.

As persuasion of the correctness of this theory, we call attention to the fact that, early in this law's operation, the Interstate Commerce Commission, through its Secretary, addressed a letter (which is referred to in their Fourteenth Annual Report, p. 84), to the subordinate branches or various railway organizations calling attention to the provisions of said act and also gave it as the opinion of the Commission that section 8 of the act does not fully release them from responsibility for contributary negligence.

It seems very clear to us that, whatever view we may take of this case, we are led to the legal conclusion that decedent was guilty of negligence that contributed to his death, and that the plaintiff, however deserving she may be, or however much we regret the unfortunate accident, cannot recover.

And now, July 21, 1902, the motion to take off the com-
34 pulsory non-suit heretofore granted is refused.

FRANK J. THOMAS,
President Judge 30th Jud. Dist., Specially Presiding.

No. 194 April Term, 1901. Catherine Schlemmer *v.* The Buffalo, Rochester and Pittsburgh Railway Company. Opinion of Court *sur* motion to take off compulsory non-suit. Filed July 22, 1902.

35 In the Court of Common Pleas of Jefferson County. No. 194, of April Term, 1901.

CATHARINE SCHLEMMER
v.
THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

Plaintiff by her attorneys excepts to the refusal of the Court to set aside the non suit in this case, and at their request a bill of exceptions is sealed as of July 21 1902.

FRANK J. THOMAS, [SEAL.]
President Judge 30th Judicial District, Specially Presiding.

No. 194 of April Term, 1901. Catharine Schlemmer *vs.* The Buffalo Rochester and Pittsburgh Railway Co. Exception and Bill. Filed Sept. 15, 1903.

36 In the Court of Common Pleas of Jefferson County. No. 194, April Term, 1901.

CATHERINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER & PITTSBURG RAILWAY COMPANY.

Stenographer's Transcript.

Filed January 24, 1903.

BUELL B. WHITEHILL,
Official Stenographer.

37 In the Court of Common Pleas of Jefferson County. No. 194, April Term, 1901.

CATHERINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER & PITTSBURG RAILWAY COMPANY.

Stenographer's Transcript of Notes of Trial.

Tuesday, April 29th, 1902, this case came up for trial at a regular term of the Court of Common Pleas held in and for the County of Jefferson, at Brookville, Pa., before the Honorable Frank J. Thomas, Judge of the Thirtieth Judicial District of Pennsylvania, specially presiding.

There appeared on the part of the plaintiff A. J. Truitt, Esq. and Jefferson G. Wingert, Esq.; and on the part of the defendant company Levi G. McCauley, Esq., and Cadmus Z. Gordon, Esq.

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The following proceedings occurred:
Jury called and challenged in due form.
Jury sworn in the trial of the cause at 11 o'clock A. M.
The plaintiff opened her case to the jury by Jefferson G. Wingert, Esq.

39 Mr. HARRY COATES, called as a witness on the part of the plaintiff, was duly sworn.

Direct examination was conducted by Mr. TRUITT:

Q. Mr. Coates, what is your age?
A. 33.
Q. What is your occupation?
A. Yard conductor.
Q. What did you say?
A. Yard conductor.
Q. How long have you been in the railroad business, working on the railroad?

A. About 15 years.
Q. 13?
A. 15.
Q. 15 years. Mr. Coates, where was you on the evening of August 5th, 1900?
A. I was switching in the Du Bois yard.
Q. What was your employment at that time?
A. I was yard conductor.
Q. You was yard conductor there then?
40 A. Yes, sir.
Q. Did you know Adam Schlemmer?
A. I did.
Q. How long before that had you known him?
A. Oh, I had known him about four or five years.
Q. What was his business?
A. He was flagman at the time?
Q. At that time?
A. Yes, sir.
Q. What business had he, or occupation had he, for years before that?
A. Why, he had been a brakeman.
Q. He had been employed on a railroad?
A. Yes, sir.
Q. Well, now, tell the court and jury what took place on the evening of August 5th, 1900, from the very beginning of it, Mr. Coates.
A. Well, this train came in in the afternoon, and I switched the train and put it on the side track, for the train going south to take with them.
Q. That going south would be going towards Punxsutawney?
A. Towards Punxsutawney; yes, sir. And I pulled this train up, and this crew came in and got the train; a train with
41 seventeen cars, I think it was, and a steam-shovel.
Q. Where was this steam shovel?
A. It was on the rear end of the train.
Q. Mr. Coates, now describe that steam-shovel to the Court and jury; what was it?
A. Well, sir, it was a Martini steam-shovel.

By Mr. GORDON:

Q. What name?
A. A Martini steam shovel.

By Mr. TRUITT:

Q. And what was it used for?
A. It is used for construction work.
Q. For heavy shoveling in building a railroad; is that it?
A. Yes, sir.
Q. Now, how was it as to coupling on it; what kind of coupling had it on it?
A. It had a drawhead and a drawbar.
Q. Now this drawhead on that shovel car:—where was it?

A. It was right in under the box of the car.
Q. It was under the box of the car?
A. Yes, sir.
Q. That was the link the drawbar was fastened to?
42 A. The drawbar was in the drawhead.
Q. How far under the box of this car or shovel car was it fastened?
A. I should judge about two feet; between two and three, anyhow.
Q. Now, did the drawhead come out any farther than that, or was it back that far?
A. No; the drawhead did not come out at all. The drawbar was there to come out.
Q. And the drawhead was about two and one half feet from the end of the car?
A. Yes, sir.
Q. The draw bar,—where did it stay?
A. The drawbar stayed right in the drawhead. It was long enough to run out to make a coupling.
Q. How long, about, was it?
A. The drawbar was about three feet long, I should judge.
Q. And it would project past the end of that shovel car about how far?
A. About a foot.
Q. What was the size of that drawbar, Mr. Coates?
A. Well, I suppose it would weigh in the neighborhood
43 of 75 or 80 pounds, anyhow.
Q. When it was not in use or coupled or anything, where was it?
A. Just hanging down in the drawhead.
Q. How far down did it drop?
A. Oh, probably it would be about two feet from the ground.
Q. Now, where it was used to couple with on the other end of it,—what kind of an end had it there?
A. Indeed I did not pay particular attention to the other end of the car at all.
Q. Did it have a hole in it?

By Mr. GORDON: He is speaking of the other end of the drawbar.

A. I thought you were speaking of the other end of the car. It had a hole through the bar for a pin to be dropped in it.
Q. Then the way to couple to another car was to drop a pin through that hole? Is that it?
A. Yes, sir; you would have to raise, and know the other coupling
Q. Mr. Coates, what kind of a coupling was that? Was it a safe coupling or a dangerous coupling, or what was it?
A. It would just be according to how a man would go
44 at to make the coupling.
Q. How?
A. It would just be according to how a man would go at to make the coupling. It would be dangerous in one way, and in another way it would not.

Q. Would you say as good as a safety coupler?
A. Oh, no; no, sir.

By Mr. GORDON: We object to that, and ask that it be stricken out.

By the COURT: They do not have to furnish the best appliances. They may furnish something that is reasonably safe.

By Mr. TRUITT: We will come to this question that under the United States Statute they are required to furnish a safety coupler.

By the COURT: I think it is not a question of comparison with a safety coupler.

Q. Well, was it a safe coupler?
45 A. No; it was not just exactly a safe coupling.
Q. Wasn't it, Mr. Coates, a very dangerous coupling?
A. Well, it was just according, I say, as how a man would go to make the coupling. I have made many such couplings myself, and I have seen a good many.
Q. Well, what would you say if used after dark? How would you put it?
A. Well, after dark I would find what kind of a coupling I had to make. I would not go into it there to make that coupling unless the train was stopped, and would shove the caboose onto the train.
Q. If a man did not know what kind of a coupling it was, would it be a safe coupling to make after night?

By Mr. GORDON: Objected to by the defendant as leading.

By the COURT: There is no evidence to show that he made the coupling after night.

By Mr. TRUITT: We will follow this by evidence showing that the coupling was made after night.

46 By the COURT: Objection sustained.

Q. Mr. Coates, after that train was brought up there, will you just tell us about bring- it up and making this coupling. Tell us about that.
A. About him pulling the train out?
Q. Yes, sir.
A. He came in and got hold of his train and pulled it out onto the main track from No. 1 track. He had his caboose standing on the main track, and when he went to back down to the caboose the conductor stood on one side of the caboose and the flagman on the other. The conductor had a lamp; and I would not say the flagman had a lamp with him, for it was not dark yet. But anyhow, these seventeen cars and engine being quite a ways away from the caboose, this man had his lantern, and stepped out and gave a signal to stop, when this flagman went to make the coupling. I was there, and I seen he was too high. I seen what kind of a coupling it would be in that shape, and I told him to keep down.

By Mr. GORDON:

Q. You told Mr. Schlemmer to keep down?
47 A. I told Mr. Schlemmer to keep down. He had got down, but raised his head up, and I hollowed again. And I

seen he was going to get pinched, and I turned my head away; and as soon as the cars parted enough to get through, I got through between the cars and the caboose and helped pick the man up.

By Mr. TRUITT:

Q. Well, what was wrong with the man?
A. The top of his head was crushed.
Q. Sir?
A. It crushed the top of his head. He had raised his head too high.
Q. What crushed the top of his head?
A. The end of the caboose and the steam shovel plow.
Q. Were there any dead-heads on the end of the caboose?
A. Yes, sir; there were on the caboose.
Q. Was there on the shovel car?
A. No, sir; not on the shovel car.
Q. Describe the coupling on the caboose.
A. It was a patent coupling that was on the caboose.
Q. That is, one of this kind that goes around and catches?
A. Yes, sir.

Q. Now, to couple this car, this shovel car, to this caboose
48 that night, just explain what had to be done?

A. To couple the car he would have had to come up very slow and kept down under the car in order to make the coupling; or stop the car and shove the caboose up again it.
Q. Describe the coupling right there.
A. He would have had to have lifted this drawbar up to the patent coupler, and then dropped his pin through the drawbar.
Q. He would drop it through the patent coupler and the drawbar,—the pin,—and that would couple it?
A. Yes, sir.
Q. About what size, now, was that hole or place that he had to put this in?
A. Well, there was lots of room there for the drawbar link.
Q. About what size was that place or hole that the end of the drawbar there had to be attached to the patent coupler?
A. Oh, I could not say.
Q. About an inch or two high, was it?
A. Yes, sir, about that.
Q. And about two or three inches wide?
A. Yes, sir.
Q. And the drawbar would take up about that whole space, wouldn't it?

49 A. Just about that space; yes, sir.

Q. After that what did you do? What caused this accident? What happened when he went to couple there?
A. Well, he got his head too high.
Q. Well, did he make the coupling?
A. No, he didn't make the coupling. He missed it.
Q. He missed it?
A. Yes, sir.

Q. How did he miss it?

A. When he raised the drawbar up in that drawhead to the patent coupler the drawbar slipped by the drawhead.

Q. And the caboose and the end of the shovel car came together?

A. Came together; yes, sir.

Q. Wasn't that a very dangerous end on that shovel car?

Objected to by the defendant.

By Mr. TRUITT: He says he has been in that work for seventeen years.

By the COURT: It is very leading, to say the least. It is quite a leading question.

50 By Mr. TRUITT: I only ask it in this way: that he has had experience for fifteen years; and whether or not the end of that car, without dead-woods on it, was a dangerous car or not.

Q. Answer from your experience in the railroad business of fifteen years.

A. Well, I have often seen cars a good bit that way, that a man had to keep down in under a car in order to make a coupling. I have often run across big cars that way that had bumpers on them, that were broken off in that same way. A man has to watch that, you know.

Q. Are you satisfied with your answer to that question?

A. Why, yes.

Q. You are. You say you do not know whether he had any lantern or not?

A. I do not know whether he had his lantern with him or not.

Q. You testified before the Coroner in this case?

A. How is that?

Q. You testified before the Coroner in this case?

A. Yes, sir.

Q. Now will you just refresh your memory whether you did not testify he had a lantern?

51 A. I say I cannot mind now whether he had his lantern or not, but I know the conductor had his lamp.

Q. What time in the day did this take place?

A. Why about eight o'clock, I think. Between eight and nine, or along there.

Q. I want to ask you whether you did not testify before the Coroner now that "I was at the crossing of the Buffalo, Rochester & Pittsburg Railway at Brady street, April 15th about 9:30 o'clock in the evening?"

By Mr. GORDON: Objected to as leading and as an attempt to contradict their own witness.

By Mr. TRUITT: This is to refresh his memory as to whether or not he did not say that.

By the COURT: Unless it appears the witness has disappointed you in his testimony, you have no right to contradict your own witness. If it should appear that he has deceived you and has testified to something other than what he is now testifying to you would have

52 such a right. But so far as the Court knows anything about it you have not been deceived by your witness in any respect.

Q. Who was there when this took place, Mr. Coates?

A. Well, there was some man that was with the steam shovel, was standing inside the door of the caboose; and the flagman; the conductor Neilson; and myself was standing right where the coupling was made.

Q. And was Mr. Meadows there?

A. Mr. Meadows came after the man had got pinched.

Q. Did Mr. Schlemmer die from this injury?

A. Yes, sir.

Q. How long afterward?

A. Well, I had my engine go down and come up the main track,—that would be about a quarter of a mile,—and get hold of the caboose, and we put the man in it; and by the time we got to the station he was dead.

Q. This caboose,—what did it depend on now to keep apart from another car?

A. It had bumpers on it.

Q. It depended then on the drawhead; is that it?

A. No, sir. Bumpers; there is bumpers on cars, you know.

Q. Do you call them dead-woods?

53 A. Yes, sir; those are called deadwoods.

Q. And do you say that this caboose had dead-woods on it?

A. Yes, sir.

Q. And did not depend on the drawheads to keep it from another car?

A. Why you know all cars have dead-woods on them, anyhow. Very nearly all of them. You do not find very many without them.

Q. Well, now, will you explain to the court and jury the difference of keeping cars apart with dead-woods and with the drawheads?

A. Well, if the drawhead would break, of course the deadwoods would be there to keep the cars apart.

Q. And if the dead-woods were not there, what would happen then?

A. They would be right together, of course.

Q. Had this caboose deadwoods on it?

A. It had the caboose dead-woods on it. Yes, sir; I think it had. Most of them had.

Q. I am asking whether you know?

A. I would not say for sure now whether it had or not.

Q. Didn't you testify at that very Coroner's inquest that it had not?

54 A. That it had not?

Q. Yes, sir; that it had none?

A. Indeed if I recollect.

Cross-examined by Mr. GORDON:

X Q. How long had Mr. Schlemmer been acting as a brakeman?

A. Indeed if I know just how long. I had known him there for three or four years anyhow on the Buffalo, Rochester & Pittsburg.

X Q. And he had been acting as a brakeman during that whole time?

A. He had been flagging for quite a while. I do not know just how many years he had flagged.

X Q. As I understand he first became a brakeman, and then after being brakeman awhile he was promoted to flagman?

A. To flagman; yes, sir.

X Q. Then he was a brakeman with experience, was he?

A. Yes sir.

X Q. About what was his age?

A. Why I suppose he was about 35, or along there.

X Q. This steam shovel you speak of is a mere machine used in excavating?

A. Yes, sir.

X Q. A machine on wheels; it is not a car at all, as I un-
55 derstand it. It was merely a machine used in excavating, on wheels. Is that right, Mr. Coates?

A. Yes, sir, that is right.

X Q. And it was equipped with a single-pocket drawhead, was it?

A. Yes, sir.

X Q. That was about the commonest coupler known prior to the introduction of the automatic, wasn't it?

A. Yes, sir.

X Q. And it is very simple, isn't it?

A. Yes, sir, it is.

X Q. And in order to couple the drawbar to this drawhead all that was necessary was to lift out the coupling pin, insert the end of the drawbar into the pocket, and drop the pin in?

A. You would have to raise the draw-bar——

X Q. I mean in coupling the drawbar to the steam shovel?

A. The drawbar stayed right in the drawhead, you know.

X Q. It was already coupled to the steam shovel?

A. Yes, sir.

X Q. And that is all that was necessary to do in order to couple to the steam shovel?

A. That was all; yes, sir.

56 X Q. Did it require any instructions to tell Mr. Schlemmer how to make this coupling; that is, did he know how to make the coupling?

A. He knows how to make a coupling, I guess.

X Q. That is, he has had enough experience to know.

A. Yes, sir; he has had experience enough to know.

X Q. All that was necessary to make the coupling to the caboose was to guide the free end of the drawbar into the slot in the knuckle?

A. Yes sir.

X Q. And Mr. Neilson had set the pin for him?

A. Yes, sir, he had set the pin.

X Q. And there was nothing complicated about it?

A. No.

X Q. The only danger that there was was that that would occur if he lifted his head too high?

A. Yes sir.

X Q. You say you notified him twice to keep down?

A. Yes sir.

X Q. Did he obey that word?

A. He got down once, and then he got his head up too high again; and I hollowed at him, and it was too late.

57 X Q. If he had obeyed your instructions, Mr. Coates, this accident could not have happened could it?

A. No, I do not suppose it would; it could not.

X Q. How far away from him were you at the time you notified him?

A. He was on one side of the caboose and I was right on the other side .

X Q. About six or eight or nine feet away?

A. About seven or eight feet, any how.

X Q. When you called to him, directing him to keep down the first time, what reply if any did he make?

A. He did not say anything at all.

X Q. But he did stoop, did he?

A. Yes.

X Q. And the second time you say you called to him to keep down?

A. Yes, but it was too late then.

X Q. Have you seen many steam shovels in your time, Mr. Coates?

A. Why no; not a great many. I have saw a few, though.

X Q. They were all equipped with this same drawhead?

A. They were all equipped about the same way.

X Q. And were all equipped with the coupling bar or drawhead?

A. Yes, sir.

58 Redirect examination by Mr. TRUITT:

R. D. Mr. Coates, how many steam-shovels did you ever see Mr. Schlemmer, the decedent, handle?

A. That was the only one.

R. Q. You say now and testify that this was the simplest form of coupler outside of the automatic coupler?

A. No. The old-fashioned drawheads is what I understood him, is the way they all used to be. The old style drawheads, you know.

R. Q. And that was coupled with a pin and link, wasn't it?

A. Yes, sir was coupled——

R. Q. And would not that be much simpler and safer than this kind of a coupler?

A. He was talking about the drawhead, I understand.

R. Q. How did a man couple with the link and pin coupler?

A. With a short link.

R. Q. Didn't he stand at the side?

A. He could not do it that way.

R. Q. Used a stick?

A. No, sir; because that was dangerous.

R. Q. Was not the orders of the railway company that he had to use a stick?

59 A. Yes, sir; you had to sign for a stick.

R. Q. And agree to make it that way?

A. If people wanted to make it that way.
R. Q. It was one of the rules, wasn't it?
A. Yes, sir.
R. Q. And you could stand away outside and couple that link and not be in any danger at all. Is that true?
A. No.
R. Q. Do you say that this shovel car, and this coupler, weighing 75 to 80 pounds, that a man had to get under, was a safer coupler that that old link and pin?
A. There was not a great deal of difference in it.
R. Q. Coul- you have made this coupling with a stick?
A. No, sir; you could not. The pin was too heavy.
R. Q. You could not have obeyed the rules of the company and made it with the stick?
A. No, sir; you could not with the stick.
R. Q. How many wheels were on that shovel car; what kind of a running gear had it down there?
A. Very small wheels; I could not just exactly say what size they were; regular ordinary wheels, however.
R. Q. The trucks. How many wheels and trucks, now, had it, if you can recollect?
60 A. It had two sets of trucks: a truck under the back part, and a truck under the front part.
R. Q. Just the same as another truck?
A. Just the same.

Recross-examination by Mr. GORDON:

X Q. You railroad men call a drawbar a link very often, don't you, Mr. Coates?
A. Why some people calls it a drawbar, and some people calls it a link.
X Q. And couple it then exactly the same way?
A. Just the same way.
X Q. Two men with a stick extending through between the cars could have lifted that bar up, and inserted the pin?
A. Yes, sir, they could.
X Q. And you say there was a rule of the road requiring men to do that?
A. Yes, sir.
X Q. Schlemmer knew that?
A. Yes, sir; they all knew it.
X Q. And they all disobey it too, pretty generally?
A. You hardly ever see anybody with a stick.

61 Redirect examination by Mr. TRUITT:

R. Q. There was a rule that all the men should receive a stick?
A. Yes, sir.
R. Q. A stick long enough to go through from one car,—or across the cars, and two men to take hold of it?
A. No; it was not made that long.

R. Q. Tell us, so we can get it on the notes. How long was it?
A. About three feet long.
R. Q. You do not mean to testify they got a stick ten or twelve feet long, for two men to take hold of to lift it up?
A. No, sir; I mean about three feet.

Recross-examined by Mr. GORDON:

X Q. It was very easy to get a stick that long and do that, if they had wanted to?
A. Yes, sir.

Mr. D. E. GENSANER, called as a witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. What is your name?
62 A. Dorsey.
Q. Gensaner. What is your age?
A. About 31.
Q. What is your occupation?
A. Brakeman.
Q. On a railroad?
A. Yes, sir.
Q. How long have you followed railroading?
A. Well I think in the neighborhood of 15 years. I do not know just exactly.
Q. Did you know Adam Schlemmer?
A. Yes, sir.
Q. How long did you know him before his death?
A. Well, possibly ten years.
Q. Had you worked with him?
A. Yes, sir.
Q. Where?
A. I work- with Adam Schlemmer on the Pennsylvania & North Western Road, and I worked with him on the Buffalo, Rochester & Pittsburg.
Q. Now, how was he as to being a competent man in his position?
A. I always considered him a competent man.
A. And as to being a careful man.
63 A. Yes, sir, a very careful man.
Q. And as to his being a sober man and industrious?
A. That part of it I do not know very much about him.
Q. Well, I want to know whether he was a man who got full, and drank at his work and all that?
A. I never saw him drink any at his work.
Q. Mr. Gensaner, where was you on the evening of this accident, August 5th, 1900?
A. Do you want to know what position I was on the train?
Q. Yes, sir; when this took place.
A. I was near the head end of the train; just about one car from the engine, I believe.

Q. Now, what was the first you knew of it; just tell us?

A. The first that I knew of it was the gentleman that was in charge of the steam-shovel came up and said that it was too bad about that man getting killed. I and the engineer and fireman was standing there wondering what was the trouble up at the rear end. I asked him what man, and he said the flagman. Then I started back.

Q. What did you see when you got back there?

A. I did not see anything. The yard engine in the meantime had come up and taken the caboose with Mr. Schlemmer back to the depot.

64 Q. Did you see him afterwards?

A. I saw him in the caboose down at the depot.

Q. Did you see him after he was dead?

A. I did.

Q. Do you know what killed him?

A. They told me that he was caught between the caboose and the body of the steam-shovel.

Q. Mr. Gensaner, what kind of a coupling had the steam-shovel on?

A. It had a drawbar coupling.

Q. Where was the drawhead?

A. I am speaking now of the end next the caboose. Is that the one you mean?

Q. That is the one I mean.

A. It had a draw bar coupling, and it had a short cast drawhead back under the body of the car.

Q. How far back was that drawhead?

A. I presume it was about two feet.

Q. How long was the drawbar that made the coupling?

A. I do not know. I did not measure it, but I presume it was between three and four feet long.

Q. How much would it weigh?

A. Possibly 80 pounds.

Q. When it was not in use what became of it? Where did it stay when it was not used, now? Do you remember?

A. Oh, it hung down there. I did not notice the position

65 it hung in, but it hung down some.

Q. When you wanted to make a coupling with it what was necessary? What had you to do?

A. Well, you had simply to raise it up and enter it into the drawhead of the next car or caboose that you were coupling on.

Q. Would you say it weighed about 80 pounds? How high would you have to lift it?

A. Well in this case I do not know just exactly how high you would have to lift it.

Q. Several inches?

A. Possibly a foot.

Q. How would that be done to make that coupling, now?

A. Well, a man would have to catch hold of it and raise it up to the position of the other drawhead.

Q. Where would he have to get to?
A. He would have to get between the cars, the steam shovel car and the caboose, or else get down under.
Q. How are you to make these couplings under the rules of the company? How were you to make the couplings?

By Mr. GORDON: Objected to by the defendant, in that the proper way to show the rules of the company would be by produc-
66 ing the written rules.
By the COURT: If they were written rules they could be proved in another way.

Q. When you went in the employ of the company did they give you any instructions about making couplings?
A. Yes, sir.
Q. What were they?

By Mr. GORDON:

Q. In writing or otherwise?
A. They were in writing.

By Mr. TRUITT:

Q. Have you them with you?
A. Yes, sir; you have them in your possession.
Q. Have you them now?
A. I do not have them with me. I have them in my possession. Any one that signs the agreement has them in his possession.
Q. And what did they give you? A stick?
A. Oh, yes; you sign for a stick.
Q. Could this coupling have been made with this stick?
67 A. Well, I do not think it could have been. I do not think that a man would have strength enough to use the stick.
Q. What kind of a coupling was attached to the caboose?
A. It was a patent coupler. A Trudgeon drawhead, I believe.
Q. To fasten the end of this drawbar to that caboose and make this coupling what was necessary;—what had to be done?
A. It had to be raised up and entered into the drawhead of the caboose.
Q. And the pin——
A. And the pin dropped down through.
Q. The end of the drawbar next the caboose had a hole in it; was that it?
A. Yes, sir.
Q. Mr. Gensaner, how many of these shovel cars in your fifteen years of experience, have you had any knowledge of or handled?
A. I do not know. If I remember right this is the only one that ever I handled or helped to handle.
Q. What would you say as to the coupling on this now, in your fifteen years of experience as a railroader, what would you say as to this being a safe arrangement?

By Mr. GORDON: Objected to by the defendant, in that the witness has not qualified himself.

68 By the COURT: I think he may answer that question. He is a brakeman, and has served on the railroad.

Q. This steam shovel car coupling now; what would you say as to it being a safe arrangement?

By Mr. GORDON:

Q. The coupling apparatus on the car alone.
A. Without the bar?

By Mr. TRUITT:

Q. And the bar, and the way it was coupled, and all that.
A. I may say that was not as safe as it might have been.
Q. How was it now, as compared with the old style of link and pin?
A. Well any one knows in the railroad business that they would not claim that was as safe as a link and pin coupler.
Q. Had that shovel-car any deadwoods on the end of it?
A. No, sir.
Q. Had the caboose?
A. No, sir; no deadwoods.

Q. Now what would keep the shovel car and the caboose
69 from banging together, coming together?

A. This drawhead, if they were coupled, would.
Q. But when this man,—this man missed the coupling, didn't he?
A. I did not see. I could not say.
Q. Well, I believe the testimony here is that he did miss it. Now when he missed it, Mr. Gensaner, from your knowledge and what you saw there of that coupling on the shovel car and the coupling on the caboose, what would take place?
A. I do not understand the question.
Q. Would the two cars come together?
A. If the coupling was missed?
Q. If the coupling was missed?
A. Yes, sir.
Q. They would come together?
A. Yes, sir.
Q. If there were deadwoods in there would they?
A. Possibly they would have. I think if there had been deadwoods on it, because the body of the shovel car was higher than the drawheads.
Q. The body of the shovel car was higher than the caboose; how much higher? Now that the court and jury may understand that, you mean the bottoms of them; the under part of the caboose
70 and the under part of that shovel car,—the under part of the shovel car was much higher than the under part of the caboose? Is that right?
A. The under part of the shovel car was higher than the drawhead on the caboose.

Q. Than the drawhead on the caboose. And the drawhead on the caboose would run under the shovel car?
A. Yes, sir.
Q. And that would permit the two cars to come together?
A. Yes, sir.
Q. What time in the day did this accident take place?
A. About 8:55.
Q. Of what year?
A. I believe 1900.

Court adjourned until 2 o'clock P. M.

Afternoon Session, 2 o'clock P. M.

Examination of D. E. GENSANER resumed by Mr. TRUITT:

Q. Do you know whether Mr. Adam Schlemmer had a lantern that evening or not; do you know whether Mr. Schlemmer had a lantern that evening or not?
71 A. I do not know. I did not see.
Q. Will you explain to us how the coupling was made; what was done?
A. Well, I did not see the coupling made, you know.
Q. Well, what I mean is, where was the caboose, and where was the train, and what was done?
A. Well, the caboose was cut off on the main track from the engine; and we backed in on No. 1 siding in the Du Bois yard, and pulled the train out, and backed into the caboose and he made the attempt to make the coupling.
Q. Was the caboose standing on the main track?
A. Yes, sir.
Q. And then you brought these seventeen cars, with the shovel car on the end, up against it to couple?
A. Yes, sir.
Q. Now was the caboose toward Du Bois or Falls Creek, or down toward Punxsutawney?
A. Well the caboose after we pulled down on the main track, the caboose was on the north end of the train, or toward Falls Creek or Du Bois.
Q. And where were you going to take this train to?
A. We were bringing it to Punxsutawney.
Q. Now, did you tell us what position you had on this
72 crew?
A. I was head brakeman on that crew at this time.
Q. What road at that time was you working on?
A. I was working for the Buffalo, Rochester & Pittsburgh Railroad Company.
Q. Where does it run?
A. Well, my understanding is that it runs or did run from Punxsutawney to Buffalo and Rochester.
Q. Is it in this county, any of it?
A. Yes, sir.

Q. And Clearfield County?

A. I think that there is part of it in Clearfield, if I am not mistaken.

Cross-examined by Mr. GORDON:

X Q. How long had Mr. Schlemmer been engaged in braking, to your knowledge, Mr. Gensaner?

A. Mr. Schlemmer was employed there before I went on the road. I can tell you that.

X Q. Well, to your knowledge how long?

A. Well, I do not know how long.

X Q. Four or five years?

A. No, not as a brakeman; no, sir.

X Q. As brakeman and flagman then together?

A. Well, possibly four or five years.

73 X Q. He was continuously employed as brakeman or flagman during that period?

A. I believe so.

X Q. What were the stages of promotion; they begin you as brakeman first, and then as head brakeman?

A. Yes, sir.

X Q. And then you worked at that a couple of years?

A Yes, sir.

X Q. Then you become middle brakeman?

A. Yes, sir; that is the way it works now.

X Q. Then end brakeman or rear brakeman?

A. No; after you brake head, then you go to brake in the middle awhile, and then as your term comes up for brakeman you get promoted from the middle to flagman.

X Q. Then Mr. Schlemmer was in the position of a flagman?

A. Yes, sir.

X Q. And a competent brakeman was he?

A. Yes, sir.

X Q. This coupling apparatus on the steam shovel consisted merely of a solid single pocket drawbar or drawhead, did it?

A. That is the part that the drawbar went into?

X Q. This is on the steam shovel?

A. Yes, sir.

74 X Q. That is, the drawbar was fastened in with a pin?

A. Yes, sir.

X Q. That is the simplest form of coupling known, isn't it?

A. The simplest in that case.

X Q. All that was necessary in order to couple to the automatic coupler on the caboose was to lift up the end of the drawbar and insert it into the slot in the knuckle of the automatic coupler?

A. Yes, sir.

X Q. And the pin was inserted before the coupling was attempted, wasn't it?

A. I believe so. I do not know about that, however.

X Q. You do not know as to that. Any brakeman would understand how to do that, wouldn't he, Mr. Gensaner?

A. Any man would understand it; yes, sir.
X Q. It didn't require any instructions to tell him how to do it?
A. No, I do not think he needed any instructions whatever.
X Q. The only thing then in order to avoid accident, was to keep down when you raised the drawbar; to keep your head down?
A. Yes, sir; he had to get down under.
X Q. And if you kept your head down there was no danger of injury, was there?
A. If you kept your head down and made the coupling
75 there *there* was no danger.
X Q. Did you notice how the train was backed up against the caboose; whether gently or otherwise?
A. Very gently.
X Q. Did it move the caboose?
A. I cannot say.
X Q. There was no shock, or anything of that kind?
A. I do not know; I was on the head end of the train.
X Q. But you did notice it was done gently?
A. It was done as gently as I know how it could be done.
X Q. You have, I believe, stated if there had been deadwoods on the caboose it could not have prevented this accident?
A. I do not know whether I said it that way or not.
X Q. Well, how is that?
A. I do not remember just how I did answer that question before.
X Q. Well it don't matter. I do not want to take any advantage of you, Mr. Gensaner. If there had been at that time they would not——
A. I think if there had been deadwoods on there it would not have prevented the accident.
X Q. Is it usual to have deadwoods on cabooses?
A. Not usual. I never saw any on a caboose. Not on that particular caboose, anyway.
76 X Q. Is it usual to have them on any ceboose?
A. Not of late years it has not been. Not since the patent arrangement has been in vogue.
X Q. This drawbar or link and pin coupling was the old style coupling, which was in use before the automatic couplers came in?
A. The old link and pin coupler was the old style; yes, sir.
X Q. And drawbars were often used too, formerly, were they not?
A. Well, it was very frequently they were used.
X Q. You have used them yourself on the engine?
A. I do not know as I ever did.
X Q. You have seen them used, though?
A. I have seen them used.
X Q. Who coupled this shovel car to the caboose after this accident?
A. I do not know that.
X Q. You know it was coupled on, do you?
A. I know it was coupled on.
X Q. Do you know who owned this car or machine?
A. I no not know that.

X Q. Do you know whether it belonged to the railroad company?
A. I do not know that.

77 Mrs. CHRISTINA FASCETT, called as a witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. Mrs. Fascett, where did you live on the 5th of August, 1900?
A. I was living right at Brady street; right at the railroad crossing.
Q. In what town?
A. Du Bois.
Q. Are you engaged in business there?
A. I have a little store there; yes, sir.
Q. Now will you tell the court and jury what you know of this accident; what you saw, or heard and saw.
A. Yes, sir. I saw the train standing out there, and I went back and served some cream; and while I was in I heard the cars come together, and the unnatural bump, as I thought, and I went to the door, and went clear out onto the road; and when I got out there the caboose and this steam shovel just give way, and I saw the man fall. And then I went back into the house, and said to this gentleman who was eating cream that there was a man killed. And I went out again, and when I went out the second time I went
78 clear to the track, and there was a brakeman or one of the men sitting on his knees, had him, and the blood just rushing from his head.
Q. Now, Mrs. Fascett, what time in the day was this?
A. As near as I could say, about 9 o'clock is what I think it was.
Q. Do you know whether the man who was killed had a lantern or not?
A. Well, I didn't see his lantern lit, but I saw his lantern laying on the track after the caboose pulled away.
Q. Where was it?
A. Where was the lantern?
Q. Yes.
A. Right in the middle of the track They picked it up.
Q. It was not light then?
A. No, sir.
Q. Did you hear any conversation among those railroad men about the accident at that time?

By Mr. GORDON: Objected to as hearsay, and hence incompetent.
By the COURT: We will allow her to say whether she heard it or not.

79 Q. In reference to this coupling?
A. Of course I heard the railroad men talking about that time, but I did not understand much about the steam shovel back there. I did hear the railroad men, to be sure, say it was not safe.

By Mr. GORDON: We ask that that be stricken out.

Q. The men who had charge of this train?

A. I could not say that. The men that was around there.
Q. Did you know any of these trainmen?
A. No, I was not acquainted with Mr. Schlemmer.

By Mr. TRUITT: If we do not connect it up, we are willing it shall be ruled out.

By the COURT: We will reserve it, then.

Q. Did you know any of the crew of this train?
A. No, sir; I do not think I was acquainted with any of them at that time. Oh, Mr. Neilson, yes, sir, the conductor. I knew Mr. Neilson.
Q. Was Neilson present?
A. Yes, sir, he was.
80 Q. Well did you hear him say anything?
A. No, sir, I did not.
Q. And you do not know whether any of the men were talking to him of this crew?
A. No; no.

Cross-examined by Mr. GORDON:

X Q. You spoke, Mrs. Fascett, of seeing, I think you used the expression the shovel car and the caboose fall apart. That is, you meant you saw them draw away from each other?
A. Yes, sir; when I got out as far as the road they just give way, and then I saw the man drop.
X Q. That was the slack of the train being taken up?
A. Oh, no, it was when the bump of the train let loose again, and then he fell.
X Q. After it had come together?
A. Yes, sir.
X Q. A foot or two or more?
A. I could not tell you. I went back again into the house.

By Mr. GORDON: We think that expression should be expunged from the record.
81 By the COURT: Yes, the answer of the witness as to hearing some of the men say it was not safe is stricken out; and the jury will take no cognizance of that in the case.

Mr. ISAAC HOOVER, called as witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. Mr. Hoover, what is your age?
A. 25.
Q. 35.
A. 25.
Q. How old are you?
A. 25 this October 29th.
Q. Mr. Hoover, where was you on the 5th of August, 1900?
A. Du Bois.

Q. What was your occupation?
A. I was working as a contractor, a brick contractor at that time.
82 Q. Had you at any time before that been employed on the railroad?
A. Yes, sir.
Q. How long before that had you quit working on the railroad?
A. About six months, I believe, if I mind right.
Q. What railroad had you worked on?
A. The Rochester and Pittsburgh.
Q. How long?
A. About, between a year and a half and two years; something like that.
Q. Did you know Adam Schlemmer?
A. I knew him when I saw him; yes. I never was personally acquainted with him.
Q. On the 5th of August, 1900, do you know anything about this accident that took place there? Now just explain what you saw there?
A. I noticed this steam shovel, as you call it. They got it to take through to Punxsutawney. I think that is where it was going
Q. You were sitting on your porch?
A. Yes, sir.
Q. Was that on Brady street?
A. Yes, sir.
Q. Is that where this accident took place?
A. Yes, sir; on Brady street crossing.
83 Q. And you saw them going and getting the steam shovel?
A. Yes, sir; they came up and got it at the crossing, and went down and got the train.
Q. Did you say on the end of the train?
A. On the rear end.
Q. And they brought it up to couple to the caboose?
A. Yes, sir.
Q. You saw that, did you?
A. Yes, sir.
Q. Who did the coupling on; what did you see?
A. Mr. Neilson was the man, I believe, who set the pin; and this man Schlemmer stood by the caboose with this drawbar to make the coupling.
Q. You saw that?
A. Of course when they came together I could not see that, because I was on the opposite side.
Q. Do you know whether he had a lantern or not?
A. I think he had.
Q. Had he it lit?
A. I think he had. If I remember right he had it lit. I know Neilson had.
Q. Did you notice this coupling before they made it?
84 A. Yes, sir, I did. That is, as it went up.
Q. You noticed it as it went up?

A. Yes, sir.

Q. Did you make any remark about it at the time that you now recall?

By Mr. GORDON: Objected to by the defendant.

By the COURT: Not what the remark was. What he saw would be competent.

Q. For two years you say you have had experience as a railroader?

A. Not quite. Near about that.

Q. And during that time did you have experience with coupling cars?

A. Yes, sir.

Q. Was that what you worked at?

A. Switching; yes, sir.

Q. Made numerous couplings during that time?

A. Yes, sir.

Q. Did you notice the coupling on this shovel car?

85 A. Well yes; I noticed the drawbar.

Q. Can you explain what kind of a coupling it was?

A. A solid drawbar; what they called a solid drawbar. A cast iron drawbar is what I always called it.

Q. And the drawbar was under the car?

A. Under the car, yes, sir.

Q. And the drawbar extended out?

A. Yes, sir.

Q. Now, how was it as to being a safe appliance for coupling cars?

A. Well, I do not think it was very safe. I could not say it was. It never looked that way to me.

Q. How was it in comparison with that link and pin?

A. Well, it was far different from the old link and pin,—the drawbar that is there. It was made in the same style, only it was heavier and unhandier.

Q. How much would it weigh?

A. Well I would not know. Probably somewhere in the neighborhood of 80 pounds. I think that is what that one would weigh.

Q. And in case a man making that coupling should miss it and not make it, was there anything there to break it on the end of that car?

86 A. No, sir; nothing to keep them from coming together.

Q. What would you say from your experience as to its being dangerous or not?

A. Well, I certainly would have to say it was a dangerous coupling to make.

Q. And in comparing it with the automatic coupler, with the latest automatic coupler,—what would you say?

A. There is certainly a big lot of difference between that——

Q. With the automatic coupler you can stand on the outside of the car?

A. Yes, sir.

By Mr. GORDON: Objected to as leading and as incompetent and irrelevant.

By the COURT: It is leading.

Q. I will ask it this way. Mr. Hoover, will you explain to the court and jury how this automatic coupler, how it is coupled? How is that coupling made?

A. Well, it is made when the cars come together in the knuckles here; they are bound to make the coupling.

87 Q. Just by the impact. Is that it?

A. Yes, sir.

Q. They will lock around each other. And how does a man have to be to make that coupling?

A. All he has to do is to open his knuckle and make the coupling.

Q. Stand outside of the coupling. Now explain the old pin and link coupling. Explain to the court how to make that.

A. You have to hold the link with your hand or stick, or whatever you have, and of course it is coupled with a link and pin.

Q. Well now, can you stand outside with your pin and guide that link in?

A. Oh, yes.

Q. And when it comes together drop that pin?

A. Well the pin is set, and they generally drop themselves.

Q. Now the only way to couple this was to get down under the car?

A. That is the only way I would know.

Q. And lift up that 80 pound drawbar and insert it in that little place in the automatic coupler, and then drop the pin down through the hold?

A. Yes, sir; certainly you would have to do that to couple

88 in order to couple.

Q. How as to it being at the time this accident occurred daylight or dark, or how was that, Mr. Hoover?

A. It was just getting dark. They could not see a signal any distance with the light. They had to have a lantern.

Q. And how was it as to being dark enough to require a lantern to make the coupling?

A. Well yes; I suppose it was. A person could see better with a lantern at that time.

Q. Do you know what became of Mr. Schlemmer after he was crushed there?

A. Yes, sir; they put him in the caboose and backed him down to the Y. M. C. A. or whatever they call it there.

Q. Did you see him afterward?

A. Yes, sir.

Q. Was he dead?

A. Yes, sir.

Cross-examined by Mr. GORDON:

X Q. Where were you sitting, Mr. Hoover?

A. On the porch.

X Q. How far from this steam shovel?

A. Well, I don't know exactly. Something between forty

89 and fifty feet; somewheres in that neighborhood.

X Q. How much?

A. Forty or fifty feet. I would not say for sure. I never measured it.

X Q. You could see from that distance at that time what kind of a coupling apparatus this shovel had?

A. Yes, sir, I could. It was right straight in front of where we was sitting, and where the caboose was cut off the coupling made.

X Q. And there was not any trouble to see the coupling apparatus if you had been right beside the car?

A. Oh, no. Certainly a person could have seen that; that is sure as to that.

X Q. Plenty of light by which to see?

A. Yes, sir.

X Q. And the coupling of the steam shovel was of the simplest kind wasn't it? Simply a solid drawhead with a drawbar attached to it.

A. Yes, that is what it was. A solid drawhead with a drawbar attached to it.

X Q. It required no instructions for a man who had had experience in braking to understand how to use it?

A. No; all there is about it is you have got to know that. Of course if a man misses it——

90 X Q. You can see at a glance how to use it and what the dangers are?

A. Oh, yes; certainly.

X Q. And it was necessary in order to avoid danger to keep down out of the shovel proper?

A. That is the only way to keep from getting smashed.

X Q. And if that was done there was no particular danger?

A. Not if you kept in under; not particularly. Not if they came back steady.

X Q. They came back very gently and steadily in this case, didn't they?

A. Yes, sir; they did.

X Q. You spoke of it being dangerous. It is always dangerous to go between cars to make a coupling, isn't it?

A. Oh, yes. That is, one of them solid couplings.

X Q. And with a link and pin it is equally dangerous if you get between the cars. That is, the danger consists in getting crushed between the cars; is that it?

A. Yes, sir; if you get between them, that is, between the bumpers——

X Q. That is the danger then?

A. That is the danger, sir.

91 Redirect examination by Mr. TRUITT:

R. Q. Mr. Hoover, now wasn't it something of a complicated arrangement there to fasten the end of that drawbar into that patent coupler?

A. Yes, sir.

R. Q. Now, will you explain your answer to the Court and jury why you answered that?

A. Well, it is harder to make that with that patent coupler than it would be with a straight coupler and a solid drawhead. I do not see why it would not be. A patent coupler is open at one side.

R. Q. And there was a very little slot there or place to put this drawbar in, wasn't there?

A. Yes, sir.

R. Q. Did you notice,—now you say there was no deadwoods on the shovel car. Were there any on the caboose?

A. No, sir.

R. Q. Now did you notice the height of these cars. What killed this man? Will you explain that. How was he killed?

A. Why he was caught between the end of this shovel that is built into the car, it looked like a car, a flat car, and between the caboose,—where he was caught. His head.

92 R. Q. Right between the two coming together?

A. Yes, sir; right where he was caught.

R. Q. If there had been bumpers on those cars, from your observation there, you say you saw them, if there had been deadwoods on these or bumpers could they have come together?

A. Oh, I do not know. In that case I think the shovel was built higher than the bumpers would have come on the caboose.

R. Q. It would have gone over?

A. I believe so.

Recross-examination by Mr. GORDON:

X Q. Mr. Hoover, in coupilng with a drawbar or a link and pin, the automatic coupler is a good deal more dangerous than the old fashioned drawhead, isn't it?

A. That is to couple; yes, sir.

X Q. To couple a draw bar or a link and pin to it?

A. I always thought so.

X Q. In other words, the automatic coupler is the meanest thing to make an unmatched coupling that ever was invented?

A. Yes; it is worse than a straight drawhead if you have got to couple with a link and pin.

X Q. That is a patent coupler such as was on the caboose.

—. ——.

93 Mr. JAMES COCHRAN, called as a witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. Mr. Cochran, where do you live?

A. In Du Bois.

Q. Where was you living August 5th, 1900?

A. South Brady street.

Q. In Du Bois?

A. Yes, sir.

Q. Did you know Adam Schlemmer?

A. No, sir; I was not acquainted with him.

Q. Do you know anything about the accident that occurred there that evening?

A. If I know anything in particular about it, Mr. Hoover and I were sitting right alongside where he made the coupling, and Hoover spoke about it when they pulled the train down; he said there is an unhandy thing to couple; and he said, "We will watch him make the coupling." That is when he pulled up on the side track. And I noticed when they backed up. I said they gave him lots of time to couple; I do not think he will have any trouble; and they backed up to the caboose, and I seen he didn't
94 make the coupling; and Hoover said, "Somebody must have got pinched down there; and we started down, and of course there he was right alongside of the coupling.

Q. Did you notice whether he had his lantern with him or not?

A. I did not in particular. No, sir; I did not.

Q. You did not look in particular?

A. No sir; I did not.

Q. Was it growing dark at that time?

A. It was just getting dark.

Q. When you went down there did you see the man that got hurt?

A. Yes, sir; I did.

Cross-examined by Mr. GORDON:

X Q. How far away were you, Mr. Cochran.

A. Well, I should judge it was about thirty or forty feet; somewheres along there. Right across the track from where it was. Across the road.

X Q. There was still enough light there that you could*n't* see what was going on?

A. Yes, it was not really dark yet. You could see them.

X Q. The train came back very gently?

95 A. Yes, sir; it came back real nice. I made the expression when it came back.

X Q. There was no difficulty for a man standing right opposite the shovel from seeing all there was to be seen?

A. Why if he was real close there was not; no.

Mr. H. C. NEILSON, called as a witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. Mr. Nielson, what is your age?

A. 30 years old.

Q. What is your business?

A. Freight conductor on the Buffalo, Rochester & Pittsburg.

Q. That is this defendant company, is it? How long have you been working, Mr. Nielson?

A. Ten years.

Q. On this particular road?

A. No, sir.

Q. How long on this line?
96 A. About seven years altogether.
Q. Did you know Adam Schlemmer?
A. Yes, sir.
Q. Was he in that crew?
A. Yes, sir.
Q. You had charge of him, had you, and of that crew?
A. Yes, sir.
Q. And that train. How long have you known Mr. Schlemmer before this accident?
A. About three or four years.
Q. What position had he in that train crew, Mr. Nielson?
A. Well sir, he was acting as brakeman that day.
Q. What took place now that evening when this accident occurred Just relate it from the beginning, Mr. Nielson?
A. Well, sir, we had instructions to take up this train, and take it to Punxsutawney. So we got the caboose and went up to Brady street crossing, and got the caboose off the main track and we were on the switch and got hold of the train and pulled it out.
Q. What was on the rear of your train?
A. The steam shovel.
Q. Will you describe that steam shovel to the court and jury.
A. Well, it was an ordinary steam shovel, is about all
97 I know about it.
Q. A truck under it?
A. Yes, sir.
Q. And was used for what purpose?
A. Used for contractors at the time.
Q. In making railroad?
A. Railroad building.
Q. To shovel dirt?
A. Yes, sir.
Q. A big shovel operated by steam?
A. Yes, sir.
Q. Well can you tell us how that is done? Did they build a truck for it to run on?
A. I could not say.
Q. You do not know how that is. Mr. Nielson, how many of them did you ever handle?
A. That is the only one I ever handled.
Q. In your ten years of experience. Mr. Nielson, explain now to us the coupling on that steam shovel?
A. Well sir, it was an ordinary casting and a drawbar, between three and four feet long, the drawbar; and this casting on the steam shovel was what we call of standard height, and it is set
98 kind of under the frame or body, or whatever they call it, of the car.
Q. On the end of it there?
A. Yes, sir.
Q. Now, do you remember what kind of a coupling was on the caboose?

A. Yes, sir.
Q. What kind was that?
A. A patent coupler.
Q. Now, what was necessary to make this coupling; to be done?
A. Well the only way to make it would be to set the pin into this drawbar, into the place where the pin goes through, and the pin would drop itself.
Q. And then backed the train to the caboose?
A. Yes, sir.
Q. And this drawhead had to be fastened, had it?
By Mr. GORDON: Drawbar.
Q. Drawbar had to be fastened in the patent coupler?
A. Yes, sir.
Q. And then you say the pin would drop?
A. Yes, sir.
99 Q. Now when it came to coupling this shovel car to the caboose tell us what took place that evening.
A. Well we backed down within about three or four feet of the caboose, and Mr. Schlemmer said that he would enter this drawbar in that and drop the pin, and I told him I would set the pin and it would drop itself. I went in and got the pin and set it, and I told him, when he went down under the car to take hold of this bar, to be sure and stay down low, so if he missed the coupling he would be in the clear so it would not catch him.
Q. Now, Mr. Nielson, why did you stay out there? Why didn't you go in there and drop that pin for him?
A. Well, sir, I was standing on the opposite side to give the signal to the engineer. It was not necessary to drop the pin. It would drop itself. And it was necessary to give the signal, so the engineer would know when he was back far enough.
Q. Was it a dangerous place to be in?
A. No, sir; not any more than making an ordinary coupling of that kind.
Q. Do you say it was not dangerous to go in there when there was no drawheads on those cars?
A. It is dangerous to make any coupling, more or less.
100 Q. Wasn't this more dangerous than ordinary couplings?
A. More than the patent coupler, yes, sir.
Q. And wasn't it more dangerous than the link and pin coupling, too?
A. I do not know that it was, any more than that a man had to get underneath there. If he stayed——
Q. Then you want to testify it was not more dangerous to make this coupling than the link and pin coupling?

By Mr. GORDON: We object to this method of examining the witness; I have no doubt the witness has testified to the truth, as well as the other witnesses; and why should there be leading questions asked, and why should these imperious questions be asked in a leading tone?
By the COURT: Unless the witness has in some way disappointed

you in the testimony he has given, and you have been led in that way to believe he would testify other than the way he has testified, you would not have the right to discredit him or cross-examine him. But if he has we will permit you so to do.

101 By Mr. TRUITT: He testified at the Coroner's Inquest in this case, and this was my reason for so proceeding.

By the COURT: If he is testifying differently now you have the right to know.

Q. Didn't you testify then, before the Coroner's Inquest that there would be no protection for a man in case he misses the coupling unless he got under the car?

A. Why I said he had to stay down in the clear.

Q. And didn't you state down at that Inquest that there was no bumpers there?

A. It was not my business.

Q. There were no bumpers?

By Mr. GORDON: We object to that question as leading.

By the COURT: You should not make a statement and ask the witness to confirm that statement.

By Mr. TRUITT: He has testified he has had ten years experience in making couplings.

102 By the COURT: They are not objecting to his competency for that purpose. But you are stating a fact, and asking him to agree with you. That is what they are objecting to.

Q. Was it dangerous to go in and set the pin and stay there?

A. I set the pin myself.

Q. Was it dangerous to go in and set that pin?

A. Was it?

Q. Was it dangerous to go in there and set that pin?

A. Why I set the pin standing on the platform myself.

Q. Was it dangerous to go in and set that pin?

By Mr. GORDON: We object to that. Nobody went in and set that pin.

By the COURT: There is no evidence that nobody went in and set that pin.

By Mr. TRUITT: He says he would not go in and set it, and stayed at the side.

103 A. I stood right on the platform and set it. It was not necessary to go between the cars at all.

Q. You got up on the caboose?

A. I set the pin when I got up on the caboose. I set it in the hole that is made for those pins.

Q. Didn't you testify Mr. Schlemmer wanted you to drop the pin after he inserted it?

A. He wanted me to drop it, and I told him I would set it so it would fall.

Q. Why didn't you do as he wanted you to?

A. I could not stay in there and give the signal at the same time?

Q. You would have got killed?

A. Probably if I had stood up there straight I might have.

Q. Mr. Neilson, I want you to state whether this was a dangerous coupling to make or not?

A. Well it would be more dangerous than a patent coupler.

Q. Would it be more dangerous than a link and pin coupling?

A. More dangerous than a link and pin coupling?

Q. Yes, sir.

A. Well, the difference would be a man would not have to stoop down in order to make the link and pin coupling, and he would to make one of this kind.

104 Q. Now making the link and pin coupling he would stand on the outside?

A. No, sir, he would have to stand on the inside between the cars, without he would use a stick, and then he would be partly between them.

Q. Then he could stand outside if he used a stick?

A. Partly.

Q. If the man had not used a stick and there had been a link and pin coupling there. Well you think he could have done that with a stick?

A. How is that?

Q. You say it could have been done with that stick?

A. Making a common link and pin coupling?

Q. To make this coupling. Could he have done that with that stick? What had he to do to make it?

A. Well, sir, the only thing he had to do was to get down and take this bar and enter it right into this patent coupler where it is provided there for a place to enter the bar, this drawbar.

Q. And that was a very small place in there, wasn't it?

A. About two inches, I suppose.

Q. Mr. Nielson, what time of day did this take place?

A. 8:55.

105 Q. Had you your lantern there?

A. Yes, sir.

Q. Was it lit?

A. Yes, sir.

Q. Was Mr. Schlemmer's lit?

A. I could not say whether his was lit or not. It more than likely would be.

Q. Had Mr. Schlemmer a lantern?

A. I could not swear that he did. It has been so long ago I don't remember.

Q. Did you see the accident take place?

A. Yes, sir.

Q. Did you see anything drop at the time it took place?

A. The only thing I saw drop was Mr. Schlemmer when the cars parted.

Q. Did you notice his lantern drop?

A. No, sir.

Q. Did this kill Mr. Schlemmer?

A. Yes, sir.

Q. He died?
A. Yes, sir.
Q. Where did this shovel car come from?
A. I don't remember where it came from. We was to take it from Du Bois to Punxsutawney.
106 Q. Sir?
A. I say I don't remember where the car came from.
Q. Where was it to go to?
A. We was to take it to Punxsutawney.
Q. Did you take it?
A. Yes, sir.
Q. When?
A. That day; that evening, rather.
Q. How was it now,—will you explain to us what the height of those two cars was, the shovel car and the caboose? Just explain how they were as to heights?
A. The heights of the cars or the heights of the drawheads?
Q. The height of the drawheads?
A. The drawheads was the standard height and this drawbar could be raised from 28 to 36 or 37 inches; raised or lowered.
Q. Do I understand you it hung down that far and had to be lifted up that far?
A. When it hung down it hung down so it was 27 or 28 inches from the ground.
Q. Well how far was it from the bottom of the car to which it was attached? How far down?
A. Did it drop down?

107 By the COURT:

Q. How much lower?
A. How much lower than the body?
Q. Yes, sir.
A. Five or six inches.
Q. What killed Mr. Schlemmer?
A. Getting his head mashed between the two cars, I suppose.
Q. What parts of the cars?
A. The body of the steam-shovel and the end of the caboose.
Q. Were the drawheads the same height on those cars off the ground?
A. Yes, sir.
Q. Would the caboose run under the shovel car?
A. Not that I know of.
Q. When they would come together, what was there to keep them apart, Mr. Nielson?
A. Well, there was this drawbar and this drawhead.
Q. If he missed the coupling, as he did, then what took place?
A. Well, it was owing to how this drawbar would be placed. If the drawbar was held up even with the drawhead, it would not come together. But in case it happened as it did, the drawbar not being raised up high enough, and got under the car, it would permit them to come together.

Q. And then they did come together?
108 A. Yes, sir.
Q. How about Mr. Schlemmer being an experienced railroad man?
A. From what I understand he had from four to six years experience. Something like that.
Q. How did you find him as to competency and carefulness?
A. He was a competent man.
Q. And careful?
A. So far as I know.
Q. Since refreshing your recollection, Mr. Neilson, what do you say now as to whether he had a lantern and whether it was lighted?
A. Well, sir, it has been so long since the time it happened, I could not say whether he had one or not.
Q. How was it as to darkness coming on?
A. Well, it was just getting dusk. It was not absolutely necessary to have a lamp, but we did. When we got the train ready I was going up to the head end to ride, the head end to the Stanley, and it would be dark when we got there; and that is the reason I had it.
Q. You calculated it would be dark from the time you got from the head end down to the other end of your train?
A. No, sir; I was going to ride the head end of the train from there to Stanley. We always get orders at Stanley, at the end
109 of the drouble track. It would be dark at Stanley, when we got there, and that is the reason I wanted a lamp.
Q. You could have lit the lantern when you got to Stanley?
A. The lamp was lit; it was not absolutely necessary to use the lamp. It was not that dark yet.
Q. Mr. Neilson, why was you moving this shovel car at that time or taking it to Punxsutawney?
A. Why it was a contractor's outfit. It was built down the line some place.
Q. You was a conductor, was you?
A. Yes, sir.
Q. And had a bill to take it?
A. Yes, sir.
Q. And what was the number of this train, Mr. Nielson?
A. We were 208.
Q. This caboose belonged to that train, did it?
A. No, sir; the caboose belonged to the Buffalo, Rochester & Pittsburgh Railway Company.
Q. Well, you was directed to take it along with you?
A. Yes, sir.
Q. And did take it?
A. Yes, sir.
110 Q. And the shovel car?
A. Yes, sir.

Cross-examined by Mr. GORDON:

X Q. Mr. Neilson, to whom did that shovel car belong?
A. It belonged to some contractor. I do not know who.

X Q. It was not owned by the Buffalo, Rochester & Pittsburgh Railway Company?
A. No, sir.
X Q. The coupling apparatus on the shovel car was the simplest kind known, wasn't it?
A. Yes, sir.
X Q. And such as was familiar to every brakeman?
A. Yes, sir.
X Q. There was nothing which required any instruction in making this coupling, except to keep down, was there?
A. That was all.
X Q. Mr. Schlemmer knew how to make it, did he?
A. Yes, sir.
X Q. You say that you warned him just before the coupling was made to keep down, to keep his head down, so if he missed the coupling he would miss the cars and not be pinched?
A. Yes, sir.
111 X Q. Had he regarded your instructions would he have been injured?
A. No, sir.
X Q. Then it was the disregard of the instruction given him by you that resulted in his death?
A. Yes, sir.
X Q. How did the train come up, Mr. Neilson?
A. It come back very easily.
X Q. Did it move the caboose at all?
A. No, sir.
X Q. Who made the coupling afterward on this steam shovel?
A. I did.
X Q. Did you have any difficulty with it?
A. No, sir.

Redirect examination by Mr. TRUITT:

R. Q. That was the first steam shovel car you had ever coupled, Mr. Neilson?
A. Yes, sir.
R. Q. And you gave instructions to Mr. Schlemmer how to do it?
A. Yes, sir.
R. Q. And in following your instructions he was killed? Is that so?

112 By Mr. GORDON: Oh, no.

R. Q. Didn't he try to follow out your instructions?
A. If he had followed the instructions he would not have been hurt.
R. Q. Didn't he try to follow out your instructions? Didn't he get down there on the ground?
A. Yes, sir.
R. Q. Didn't he have his lantern there?
A. I could not say whether he had his lantern or not.
R. Q. Didn't he hold up that big heavy bar there to the place?

A. He attempted to do it.
R. Q. And didn't he try to keep his head down, too?
A. I do not know whether he did or not. I suppose he did.
R. Q. What part of his head was crushed?
A. The upper part.
R. Q. His whole head was not crushed?
A. No, sir.
R. Q. Well, then, he certainly kept down part of his head?
A. Yes, sir.

Recross-examined by Mr. GORDON:

X Q. But it was the raising up in violation of your orders
113 that caused his death, wasn't it?
A. Yes, sir.

Mr. LEE E. MEADOWS, called as a witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. Mr. Meadows, what is your age?
A. 29 years old.
Q. What is your occupation?
A. Braking and flagging.
Q. On what road?
A. The Buffalo, Rochester & Pittsburg.
Q. The defendant in this case,—the Buffalo, Rochester & Pittsburg Railway Company?
A. Yes, sir.
Q. Mr. Meadows, how long have you been employed on the railroad?
A. About twelve years since I started. I have not been
114 working all the time, though; with the exception of about two years and a half.
Q. Then you have been employed between nine and ten years?
A. Yes, sir.
Q. On the evening of August 5th, 1900, Where was you?
A. In Du Bois.
Q. Was you part of the crew of this train?
A. Yes, sir.
Q. What was your position?
A. Braking in the middle at that time?
Q. Did you know Adam Schlemmer?
A. Yes, sir
Q. What did you see of this accident?
A. We was ordered for eight o'clock that night, and we pulled up on the Main track at Brady street Crossing, and got the caboose, I think, and went in and pulled up this train of seventeen or eighteen cars,—seventeen cars and a steam-shovel. I think as well as I can remember I throwed the main track switch and got up between the first and second car over the caboose; that is the end of the steam shovel and one car from the caboose; and set up a couple of brakes,

to steady the train if it came back, and gave the signal. I knew we had a coupling to make, and wanted to go back steady.

115 Q. When did you first hear of the accident?

A. We backed up, I suppose, very close to the caboose. I did not feel any jar. They signed him down, and I stood and waited for the signal; and they gave a signal to back up, and I gave the signal, and then they gave the signal to move up; and then they slacked off, and one man standing on the car says, "My goodness, go back there; that flagman got killed?"

Q. What did you do?

A. I got down and went back.

Q. You went back?

A. Yes, sir.

Q. What did you see when you got back there?

A. He was lying out of the track, I suppose two or three feet from the track, when I got back there.

Q. What time of day was it?

A. Why it must have been 8:30 or 40. Somewhere thereabouts.

Q. Was it growing dark, Mr. Meadows?

A. Why it was not very dark, no.

Q. Did you know Adam Schlemmer?

A. Yes, sir.

Q. How long had you know- him?

A. I suppose eighteen or twenty months.

Q. You had worked with him, had you?

116 A. Yes, sir.

Q. Did you notice whether he had his lantern there that evening?

A. Whether he had his lantern?

Q. Lantern.

A. He had that lit up all right. I was at the rear end of the train with him. He had it lit up. I do not know whether he had it with him, but it was lit.

Q. When you went back to the rear he had his lantern?

A. I do not know whether he had it lit or not. It was on the caboose and he was on the caboose.

Q. How long was that before he was killed?

A. I suppose it was not over 15 or 20 minutes. He went and cut the cars off.

Q. Did you see the conductor, Mr. Nielson?

A. He was standing on the left hand side, giving the signal.

Q. Do you know whether he had a lantern or not?

A. Yes, sir; he had.

Q. Was it lighted?

A. Yes, sir.

Q. Were there any signals given there?

A. Any signals?

Q. Yes?

A. Yes, sir.

117 Q. Who gave them?

A. I could not say for sure, but I suppose it was the con-

ductor, Nielson. He was giving the signals, and Mr. Schlemmer was standing on the other side of the coupling.

Q. What was he signaling with?

A. With a lantern.

Q. Why was he signaling with a lighted lantern?

A. Why it was, as near as I can remember it was after sundown all right, and we usually lighted up our lamps at sundown as a usual thing.

Q. If it had been daylight that would not have been necessary would it?

A. No, sir.

Q. Mr. Meadows, did Mr. Schlemmer die as a result of this accident? Did you see him afterwards?

A. Yes, sir.

Q. After he was dead?

A. Yes, sir.

Q. What part of his head was crushed?

A. Why somewhere in there, about. In there (Indicating).

Q. The top part?

A. Yes, sir.

Q. Where was he taken to?

118 A. We took hom in the caboose, and ran the caboose down to the station, and took him from there up to the Y. M. C. A.

Q. You say you have been in that business about twelve years? About ten years?

A. It is about two and one half years——

Q. During that time how many of these steam shovel cars have you handled?

A. That is the first one, and I think we have only handled one since that that I can remember of.

Q. That was the first to that date?

A. Yes, sir.

Q. Mr. Meadows, did you notice the coupling on it?

A. Yes, sir.

Q. What kind of a coupling was it?

A. It was what I would call a solid drawhead, fastened underneath this platform that extended out over the drawhead.

Q. What was necessary to couple to the caboose that evening?

A. Well, the drawbar put into the drawhead.

Q. For a flagman to couple to the caboose what was required of him? What would he have to do?

A. What would he have to do?

Q. Yes, sir.

119 A. I suppose get down underneath the car. A man could not very well couple with a short stick.

Q. He would have to get down underneath the car, and get down on the ground, would he?

A. Yes, sir.

Q. And hold up this drawbar?

A. Yes, sir; and enter it into the drawhead of the caboose.

Q. Now, Mr. Meadows, what would you say whether that was dangerous or not?

A. Of course any of them is dangerous if you get caught in there.

Q. With the automatic coupler he does not have to get down in there, does he?

A. No, sir; he does not have to go in there at all.

Q. With a pin and link coupler how about it?

A. Why that is all right if you do not get in between the bumpers, and you are not liable to if you couple with a stick.

Q. This you could not couple with a stick?

A. You could not couple with a 24 inch stick.

Cross-examined by Mr. GORDON:

X Q. How did the train come back, Mr. Meadows?

120 A. Why it came back very steady.

X Q. Did it impact at all or didn't you notice that?

A. I could not tell. I was away the length of the steam-shovel car and another car. I heard them say it never moved the caboose at all.

X Q. It was moved gently?

A. As gently as he could move an engine.

X Q. Was it light enough for a man to see the coupling apparatus, and all about it?

A. Do you say was it light enough?

Q. Yes, sir; if he had been standing beside it?

By Mr. TRUITT: Or had been below, where he was.

A. A man could see very well if he was standing at the side. There is generally a big light there, anyway.

X Q. The coupling apparatus was one of the simplest couplings known, merely a solid drawhead with a solid drawbar attached to it?

A. Why as near as I could remember it was what I would call a solid drawhead bolted into the solid part of the steam-shovel.

X Q. It was a very simple arrangement, wasn't it?

121 A. Why yes, it was simple enough.

X Q. It didn't require any instructions to a brakeman to know how to handle it, did it?

A. Why a man would want to be very careful in making it to keep down.

X Q. Well, he would know how to handle the coupling, wouldn't he?

A. I suppose he would know if he went to couple the cars.

X Q. Well, you knew?

A. I would know how if I would go to make it.

X Q. Schlemmer knew how?

A. I suppose he did.

X Q. All that was necessary was to keep down, in order to avoid danger; is that right?

A. Yes, sir; if you keep down you are all right; and if it came back steady enough so he did not get run over.

X Q. Well, you did come back steady this time?

A. Yes, sir.
X Q. Any coupling that requires a person to go between the cars is dangerous, isn't it?
A. Yes, sir.
X Q. And that was what rendered this dangerous, principally, wasn't it?
A. Why yes; I understand that is the way he got killed,
122 coupling the car.
X Q. You do not know who owned this shovel car?
A. No; I do not know.

Redirect examination by Mr. TRUITT:

R. Q. Mr. Meadows, now would it be darker down under that car than on the outside around there?
A. Why not very much.
R. Q. But it was some darker?
A. Yes, sir; I should think it would be some darker.

Mr. JOHN C. MCCRAY, called as a witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. Mr. McCray, what is your business?
A. I am special agent for the Buffalo, Rochester & Pittsburg Railway Company.
Q. The defendant in this case?
A. Yes, sir.
123 Q. How long have you been acting as their special agent?
A. Fifteen years.
Q. Did you know about this shovel car that we have had this controversy about?
A. Why I investigated this *action*, but I never saw the steam-shovel car since the accident occurred.
Q. Where was it coming from Mr. McCray?
A. Why I learned from railroad men that it was coming from Limestone.
Q. In what state?
A. That is in the State of New York.
Q. And where was it going to?
A. Crenshaw, I think. This I know from hearsay.

By the COURT:

Q. Where?
A. Crenshaw, Pa. This I know from hearsay.

By Mr. TRUITT:

Q. From that investigation?
A. Yes, sir.
Q. What was it used for?
A. In the construction of railways.

Q. Who had it belonged to?
124 A. To the construction company; I think T. J. Bryant at the head of it.
Q. Will you just explain to the court and jury how it is used, Mr. McCray?
A. I do not know about that. I never had any experience with those shovels; and in fact I do not think I know anything about the shovel.
Q. You do not think that you could explain how it operates?
A. Well, I think you could prove that better by somebody else, because I never worked a day on a railroad in my life.
Q. You say it was being taken to Crenshaw?
A. Yes, sir.
Q. Where is that?
A. On the Pennsylvania & North Western.
Q. That was for construction work down there?
A. Yes, sir.
Q. Near Pittsburgh, in this state?
A. Yes, sir.

Cross-examined by Mr. GORDON:

X Q. Was it Glenshaw?
A. Crenshaw, I think.
125 Q. Crenshaw in Jefferson County, or was it Glenshaw?
A. Well, it was going down in near Pittsburg.
X Q. Well, it did not belong to the Buffalo, Rochester & Pittsburg Railway, did it?
A. No, sir.

Mrs. KATHERINE SCHLEMMER, called as a witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. Mrs. Schlemmer, what is your name?
A. Mrs. Kate Schlemmer.
Q. Mrs. Katherine Schlemmer?
A. Yes, sir.
Q. Where do you live?
A. Why I live with my father, between Winslow and Cloe.
Q. With your father between Winslow and Cloe?
A. Yes, sir.
Q. That is in this county?
A. Yes, sir.
126 Q. Was you ever married?
A. Yes, sir.
Q. Who to?
A. Adam Schlemmer.
Q. When?
A. Why the 6th of November I was married ten years. We was married ten years when he was killed on the 6th of November.

Q. You would have been married ten years if he had lived to the 6th of November?

A. We was married ten years when he was killed on the 6th of November.

Q. Did you ever have any children, Mrs. Schlemmer?

A. We had two.

Q. Two children?

A. Yes, sir.

Q. What was there names?

A. Edwin Earl and Charles Johnson.

Q. Edwin Earl and Charles Johnson Schlemmer.

A. Yes, sir.

Q. How old is the older?

A. Five years old.

Q. And the younger?

A. Four.

127 Q. Do you remember when they brought Mr. Schlemmer home?

A. Yes, sir.

Q. Was he dead?

A. Yes, sir.

Q. Did you bury him?

A. Yes, sir.

Q. Where?

A. Graffius' Cemetery.

Q. In this county?

A. Yes, sir.

Q. Mrs. Schlemmer, what was his business, his occupation, at the time he was killed?

A. Why it was flagman.

Q. On what railway?

A. The Buffalo, Rochester & Pittsburg.

Q. What were his wages?

A. Well, they averaged from $65, $70 and $80 a month.

Q. $65, $70 and $80 a month?

A. Yes, sir.

Q. What was his age, Mrs. Schlemmer, at the time he was killed?

A. Thirty one years.

Q. How was it as to his being a healthy man?

128 A. He was always a healthy man.

Q. As to working steadily, and all that; how was that?

A. He always was a good man to work.

Q. Are these your children here, Mrs. Schlemmer? (Indicating.)

A. Yes, sir.

Q. They are both living?

(No answer.)

No cross-examination.

Mr. J. A. SCOTT, called as a witness on the part of the plaintiff, duly sworn.

Direct examination conducted by Mr. TRUITT:

Q. Mr. Scott, I want you to state whether you have had any experience as an insurance agent?
A. I have had some; yes, sir.
Q. In that have you had knowledge as to the actuary tables, or whatever it is called?
A. Yes, sir; the Experience Table; the Experience table of Mortality.
129 Q. Have you those with you?
A. I have some of these of the insurance company.
Q. What is the expectancy of life of a person 30 years of age?
A. Tables vary some. The ones I think most generally used are the Combined Experience Table of the insurance companies. What age?
Q. 31.
A. 33, 72 years.
Q. 33. 72 years.

By Mr. TRUITT: Plaintiff offers this in evidence.

No cross-examination.

Mr. JOHN C. MCCRAY, recalled as a witness on the part of the plaintiff.

Direct examination conducted by Mr. TRUITT:

Q. What is the business of this defendant company, Mr. McCray?
A. Well, they carry freight and passengers.
130 Q. Where — their lines extend from?
A. Rochester and Buffalo, in the State of New York, to Butler, in the State of Pennsylvania.
Q. How as to being through the Counties of Clearfield and Jefferson?

By Mr. GORDON: Oh, that is all right.

By Mr. TRUITT: Plaintiff offers especially in this case the Statute of the United States relating to safety couplers. It was approved March 2nd, 1893, by the 52nd Congress, second session, chapter 196; and appears in the United States revised statutes, or Statutes at Large, Volume 27, page 532. We plead this especially as part of the law in the case.

Plaintiff rests.

131 By Mr. GORDON: At the close of the plaintiff's case defendant moves for a compulsory non-suit, for the following reasons:

First: That there is no proof of any negligence on the part of the defendant in this cause.

Second: That the evidence upon behalf of plaintiff proves conclusively that the accident happened because the deceased failed to

keep his head at least as low as the floor of the steam-shovel. That this omission was the fault of the deceased exclusively; and that deceased was guilty of contributory negligence and there can be no recovery in this case.

Third: That under all the evidence in this case the verdict must be for the defendant.

By the COURT: The motion of the defendant for a compulsory non-suit is sustained, and a non-suit is entered; with leave to the plaintiff within four days to make a motion to take it off.

132 By the COURT: Gentlemen of the Jury: The case which you have been sworn to try has been disposed of by the Court. We deem that it is a question of law, which the Court must determine, and we have determined it by the action that we have taken, and you are therefore relieved from further action in this case.

FRANK J. THOMAS,
President Judge.

Stenographer's Certificate.

I hereby certify that, as Official Stenographer I attended the trial of the case of Catherine Schlemmer *v.* The Buffalo, Rochester & Pittsburg Railway Company, at No. 194, of April Term, 1901, and took full and accurate notes of the proceedings therein; and that the foregoing transcript, pages 1 to 79, inclusive, is a complete
133 and accurate transcript of the original notes of trial.

BUELL B. WHITEHILL,
Official Stenographer.

Brookville, Pa., Jan. 24th, 1903.

In the Court of Common Pleas of Jefferson County. No. 194 of April Term, 1901.

CATHERINE SCHLEMMER
vs.
THE BUFFALO, ROCHESTER & PITTSBURG RAILWAY COMPANY.

Certificate.

The foregoing notes of the testimony, with the exceptions taken by counsel during the trial to the rejection or admission thereof, have been examined by me, and are hereby approved and ordered to be filed.

FRANK J. THOMAS,
President Judge 30th Judicial District, Specially Presiding.

134 *The Supreme Court Docket Entries.*

CATHERINE SCHLEMMER, Appellant,
vs.
THE BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

Appeal from Common Pleas Jefferson Co. at No. 194 April Term, 1901. Appeal and Affidavit filed and Writ exit. Jan. 17, 1903
Sept. 28, 1903, Assignment of Error filed.
Oct. 10, 1903, Record filed.
Oct. 15, 1903, Argued.
Nov. 9, 1903, Judgment affirmed. *Per curiam.*
Nov. 19, 1903, Record remitted.
Mar. 13, 1905, Præcipe for Supplemental Writ filed.
Mar. 13, 1905, Writ, Sec. 18, Act 19, 1897, issued.

135 WESTERN DISTRICT OF PENNSYLVANIA, *County of Allegheny, ss:*

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas No. — for the County of Jefferson, Greeting:

We being willing for certain causes to be certified of the matter of the appeal of Catharine Schlemmer from the judgment of your said Court, at 194 of April Term, A. D. 1901, wherein Catharine Schlemmer, Appellant, is plaintiff and The Buffalo, Rochester and Pittsburgh Railway Company is Defendant, before you, or some of you, depending, Do Command You, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Pittsburgh, in and for the Western District, the second Monday of October, 1903, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable James T. Mitchell, Doctor of Laws, Chief Justice of our said Supreme Court at Pittsburgh, the seventeenth day of January in the year of our Lord one thousand nine hundred and three.

[Seal of the Supreme Court of Pennsylvania, 1776.]

GEO. PEARSON,
Prothonotary.

136 To the Honorable, the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Western District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

(Signed) JOHN W. REID, [L. S.]
Pres't Judge.

Notice of filing within writ served on me Jan'y 19, 1903.
(Signed) C. Z. GORDON,
Att'y for Appellee.

[Endorsed:] No. 194 April Term, 1901. No. 30 of October Term, 1903. Supreme Court. Catharine Schlemmer, Appellant, *vs.* The Buffalo, Rochester and Pittsburgh Railway Company. Certiorari to the Court of Common Pleas No. — for the County of Jefferson Returnable the second Monday of October, A. D. 1903. Rule on the Appellee, to appear and plead on the Return-day of the Writ. Geo. Pearson, Prothonotary. Filed January 19, 1903. Jenks & Corbet, A. J. Truitt J. G. Wingert, Attorneys for Appellant.

137 In the Supreme Court of Pennsylvania.

SCHLEMMER
vs.
BUFFALO, ETC., R. W. Co.

No. 30, October Term, 1903. Appeal C. P. Jefferson. Filed November 9, 1903.

Per *Curiam:*

Whether the Act of Congress of March 2, 1893, (27 U. S. Stat. at Large 531) in regard to the use of automatic couplings on cars employed in interstate commerce, has any applicability at all in actions for negligence in the courts of Pennsylvania, is a question that does not arise in this case, and we therefore express no opinion upon it. The learned judge below sustained the non-suit on the ground of the deceased's contributory negligence and the judgment is affirmed on his opinion on that subject.

138 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, Sct:

I, George Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Western District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Catharine Schlemmer *vs.* The Buffalo, Rochester and Pittsburgh Railway Company at No. 30 October Term, 1903, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, in the County of Allegheny, in the said Western District of Pennsylvania, this 19th day of No-

vember in the year of our Lord One Thousand Nine Hundred and three.

[Seal of the Supreme Court Pennsylvania, 1776.]

GEO. PEARSON,
Prothonotary.

[Endorsed:] No. 30. October Term, 1903. Catharine Schlemmer, Appellant, *vs.* The Buffalo, Rochester and Pittsburgh Railway Company. Exemplification.

139 THE COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

To the judges of the court of common pleas No. — for the county of Jefferson, Greeting:

Whereas, By virtue of our Writ of Certiorari to No. 30 of October Term, 1903, of our Court, a record in the matter of the appeal of Catharine Schlemmer from the judgment of your said Court at No. 194 of April Term, 1901, wherein said Appellant is Plaintiff and The Buffalo, Rochester and Pittsburgh Railway Company is Defendant, was brought into our Supreme Court, and the said cause was there so proceeded in that on the 9th day of November A. D. 1903, the following decision was rendered, viz:

Judgment is affirmed *Per Curiam.*

Wherefore, We hereby remit you the record aforesaid with the proceedings thereon, and all things touching the same so far as in this Court they remain, for the purpose of execution as to justice shall appertain, in accordance with the decision of our said Supreme Court as aforesaid.

Witness the Honorable James T. Mitchell, Doctor of Laws, Chief Justice of our said Supreme Court at Pittsburgh, the nineteenth day of November in the year of our Lord one thousand nine hundred three.

[Seal of the Supreme Court of Pennsylvania, 1776.]

GEO. PEARSON, *Prothonotary.*

140 [Endorsed:] No. 194 April Term, 1901. No. 30 October Term, 1903. Supreme Court. Catharine Schlemmer, Appellant, *vs.* The Buffalo, Rovhester and Pittsburgh Railway Company. Remittitur. Costs, attorney, $3.

141 WESTERN DISTRICT OF PENNSYLVANIA,
County of Allegheny, ss:

Supplemental Writ.

The Commonwealth of Pennsylvania to the judges of the court of common pleas No. — for the county of Jefferson, Greeting:

We being willing for certain causes to be certified of the matter of the appeal of Catharine Schlemmer from the judgment of your

said Court, at No. 194 of April Term, A. D. 1901, wherein said Appellant is Plaintiff and The Buffalo, Rochester and Pittsburgh Railway Company is Defendant.

The record in the above recited case being required by the Supreme Court for further proceedings therein, as provided by section 18 Act approved 19 May, 1897, before you, or some of you, depending, Do Command You, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Pittsburgh, in and for the Western District, Forthwith, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable James T. Mitchell, Doctor of Laws, Chief Justice of our said Supreme Court at Pittsburgh, the thirteenth day of March in the year of our Lord one thousand nine hundred and five.

[Seal of the Supreme Court of Pennsylvania, 1776.]

GEO. PEARSON, *Prothonotary.*

142 [Endorsed:] Supplemental Writ. No. 30 of October Term, 1903. Supreme Court. Catharine Schlemmer, Appellant, vs. The Buffalo, Rochester and Pittsburgh Ry. Co. Certiorari to the Court of Common Pleas No. — for the County of Jefferson Returnable Forthwith Rule on the Appellee, to appear and plead on the Return day of the Writ. George Pearson, Prothonotary. Jenks & Corbet, J. G. Wingert, A. J. Truitt, Attorneys for Appellant.

To the Honorable, the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Western District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

—— ——. [L. S.]
—— ——. [L. S.]

143 *Certificate of Record.*

COMMONWEALTH OF PENNSYLVANIA, *County of Allegheny, ss:*

I, George Pearson, Prothonotary of The Supreme Court of Pennsylvania, for the Western District thereof, Do Hereby Certify that the foregoing Record, pages 1 to 142 inclusive, is a true and faithful copy of the Record and Proceedings of the Supreme Court of Pennsylvania, in the Western District aforesaid, in a certain suit therein pending, wherein Catharine Schlemmer is appellant and The Buffalo, Rochester & Pittsburgh Ry. Co. is appellee.

In testimony whereof I have hereunto set my hand and affixed the Seal of the said The Supreme Court of Pennsylvania, in and for

the Western District, at Pittsburgh, this twenty-first day of March in the year of Lord one thousand nine hundred and five.

[Seal of the Supreme Court of Pennsylvania.]

GEO. PEARSON, *Prothonotary.*

144 I, James T. Mitchell, Chief Justice of The Supreme Court of Pennsylvania, Do Certify, that George Pearson was at the time of signing the annexed attestation and now is Prothonotary of the said The Supreme Court of Pennsylvania, in and for the Western District, to whose acts as such full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this twenty-first day of March in the year of our Lord one thousand nine hundred and five.

JAMES T. MITCHELL.

I, George Pearson, Prothonotary of The Supreme Court of Pennsylvania in and for the Western District, Do Certify, that the Honorable James T. Mitchell by whom the foregoing Certificate was made and given, was at the time of making and giving the same and is now Chief Justice of The Supreme Court of Pennsylvania; to whose acts as such full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof I have hereunto set my hand and affixed the Seal of the said The Supreme Court of Pennsylvania, in and for the Western District, at Pittsburgh, this twenty-first day of March in the year of Lord one thousand nine hundred and five..

[Seal of the Supreme Court of Pennsylvania.]

GEO. PEARSON.

145 (Copy.)

In the Supreme Court of Pennsylvania in and for the Western District. At Law.

CATHERINE SCHLEMMER, Plaintiff,
vs.
THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY, Defendant.

Assignment of Errors.

The plaintiff in this action, in connection with her petition for a writ of error, makes the following assignment of errors, which she avers occurred upon trial of the cause, to wit:

I. The Court erred in refusing to set aside the non-suit in this case.

II. The Court erred in not submitting the question of contributory negligence to the jury.

III. The Court erred in holding that "The shovel car was not a car used in interstate commerce or any other kind of traffic."

IV. The Court erred in holding that "Plaintiff's decedent was guilty of negligence that contributed to his death."

V. The Court erred in holding that "Contributory negligence will bar a recovery for an injury inflicted by defendant's negligence which is the result of a failure to comply with statutory requirements."

A. J. TRUITT,
EDW. A. MOSELEY,
Attorneys for Plaintiff.

146 In the Supreme Court of Pennsylvania in and for the Western District. At Law.

CATHERINE SCHLEMMER, Plaintiff,

vs.

THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY, Defendant.

Petition for Writ of Error.

Now comes Catherine Schlemmer, plaintiff herein, and says:

That on or about the ninth day of November, 1903, this Court entered judgment herein in favor of the defendant, and against this plaintiff, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

A. J. TRUITT,
EDW. A. MOSELEY,
Attorneys for Plaintiff.

147 *Order Allowing Writ of Error.*

In the Supreme Court of Pennsylvania in and for the Western District. At Law.

CATHERINE SCHLEMMER, Plaintiff,
vs.
THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY, Defendant.

This 7th day of April, 1905, came the plaintiff, by her attorneys, and filed herein and presented to the Court her petition praying allowance of a writ of error intended to be urged by her, and praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceeding may be had as may be proper in the premises.

In consideration whereof the Court does allow the writ of error upon the plaintiff giving bond according to law in the sum of five hundred Dollars, which shall operate as a supersedeas bond.

H. B. BROWN,
Associate Justice Supreme Court of the United States.

148 (Copy.)

Washington Agency, No. 868.

Know all men by these presents, that we, Catherine Schlemmer as principal and American Surety Company of New York, New York, as sureties, are held and firmly bound unto The Buffalo Rochester & Pittsburgh Railway Company in the full and just sum of Five Hundred Dollars, to be paid to the said The Buffalo Rochester & Pittsburgh Railway Company and its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly ad severally by these presents.

Sealed with our seals and dated this 1st day of May in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Supreme Court of Pennsylvania in a suit depending in said Court, between Catherine Schlemmer, plaintiff and appellant and The Buffalo, Rochester & Pittsburgh Railway Company defendant and appellee a judgment was rendered against the said Catherine Schlemmer and the said Catherine Schlemmer having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Buffalo, Rochester & Pittsburgh Railway Company citing and admonishing it to be and appear

at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now the condition of the above obligation is such, That
149 if the said Catherine Schlemmer shall prosecute said writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

CATHERINE SCHLEMMER. [SEAL.]
AMERICAN SURETY COMPANY OF NEW YORK,
By JNO. S. LOUD, [SEAL.]
Resident Vice President.
Attest: L. BERT NYE, [SEAL.]
Resident Assistant Secretary.

Sealed and delivered in presence of
CECIL SMITH,
CLARENCE DODGE,
CLAUDE B. BROWN,
Witnesses as to surety.

Approved by
BROWN,
Associate Justice of the Supreme Court of the United States.

150 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, To the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Catherine Schlemmer, plaintiff and appellant, and The Buffalo, Rochester and Pittsburgh Railway Company, defendant and appellee wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of
151 a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said plaintiff and appellant

as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fourth day of May, in the year of our Lord one thousand nine hundred and five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
BROWN,
Associate Justice of the Supreme Court of the United States.

152 [Endorsed:] Writ of Error. Filed May 6, 1905. Supreme Court, W. D. Geo. Pearson, Prothonotary of Supreme Court.

153 UNITED STATES OF AMERICA, *ss:*

To the Buffalo, Rochester and Pittsburgh Railway Company, Greeting;

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Pennsylvania, wherein Catherine Schlemmer is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Henry B. Brown, Associate Justice of the Supreme Court of the United States, this fourth day of May, in the year of our Lord one thousand nine hundred and five.

H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

154 Now June 2, 1905, I hereby acknowledge receipt of a copy of the within citation.

C. H. McCAULEY,
Solicitor of Buffalo, Rochester & Pittsburg Railway Company.

155 UNITED STATES OF AMERICA,
Supreme Court of Pennsylvania, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court, in the City of Pittsburgh, this 5th day of June, 1905.

[Seal of the Supreme Court of Pennsylvania, 1776.]

GEO. PEARSON,
Prothonotary Supreme Court Pennsylvania.

Cost of Suit.

Cost of Transcript paid by Plaintiff.....$106.

GEO. PEARSON,
Prothonotary Supreme Court Pennsylvania.

Endorsed on cover: File No. 19,794. Pennsylvania Supreme Court. Term No. 292. Catherine Schlemmer, Plaintiff in Error, *vs.* The Buffalo, Rochester and Pittsburgh Railway Company. Filed June 7th, 1905. File No. 19,794.